Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.

Comment:

a. Scope and cross-references. Comment b discusses various usages of agency terminology. Comment c is a general discussion of the defining elements of agency. Comment d discusses how a relationship of agency is formed. It is not necessary that the agent manifest assent to the principal. See Comment c and § 3.01, comment b. Comments e-h discuss the elements of agency in more detail. Section 1.02 states the principle that it is a legal conclusion whether a particular relationship is one of agency. Section 1.03 defines manifestation. Section 1.04 defines and distinguishes among some common types of agents and principals.

b. Usage. This definition states the elements of the relationship widely referred to as “common-law agency” or “true agency.” The definition excludes cognate relationships in which, although the legal consequences of one person’s actions are attributed to another person, one or more of the defining elements of agency are not present. See §§ 3.12- 3.13, dealing with powers given as security and irrevocable proxies, and § 8.09, Comment d, discussing the duties of an escrow holder. Nonetheless, such cognate relationships are often grouped with relationships of common-law agency. More generally, legal usage varies. Some statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.

Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, “agency” often means an actor’s capacity to assert control over the actor’s own intentions, desires, and decisions. In economics, definitions of principal-agent relations encompass relationships in which one person’s effort will benefit another or in which collaborative effort is required. In commercial settings, the term “principal” is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another. It is also common usage to refer without distinction to parties who serve any intermediary function as “agents.” Not all such situations, however, meet the legal definition of an agency relationship. Moreover, the legal consequences of agency may attach to only a portion of the relationship between two persons, a fact that dictates care in using the term “agency relationship.” Aspects of an overall relationship may constitute agency and
entail its legal consequences while other aspects do not. It is also possible for the same person to be a principal as well as an agent in an interaction with a third party. The Introduction states the coverage of this Restatement.

c. Elements of agency. As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person’s consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process. See Comment d for further discussion of consent.

The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation. The terminology of “power” is neutral in that it states a result but not the justification for the result. An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power. Actual authority is defined in § 2.01. Actual authority does not exhaust the circumstances under which the legal consequences of one person's actions may be attributed to another person. An agent also has power to affect the principal's legal relations through the operation of apparent authority, as stated in § 2.03. Additionally, a person may be estopped to deny the existence of an agency relationship, as stated in § 2.05. Separately, a person may, through ratification, create the consequences of actual authority with respect to an actor's prior act. See Chapter 4.

Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties. Some industries make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. Some common forms of agency have a personal and noncommercial flavor, exemplified by the relationship created by a power of attorney that confers authority to make decisions regarding an individual's health care, place of residence, or other personal matters. See Comment d. On durable powers of attorney, see § 3.08(2).

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always “contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.” 1 Floyd R. Mechem, A Treatise on the Law of Agency § 27 (2d ed. 1914). It is important to define the concept of “dealing” broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not “deal” in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent. The adviser may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an agent. The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer’s organization. In contrast, the common term “independent contractor” is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of “independent contractor” is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. This Restatement does not use the term “independent contractor,” except in discussing other material that uses
the term. Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal. The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts. The metaphor of identification, which merges an agent's distinct identity with the principal's, is potentially misleading and not helpful as a starting point for analysis.

A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. A principal's manifestation may be such that an agency relationship will exist without any communication from the agent to the principal explicitly stating the agent's consent. If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent manifests an intention to the contrary or the circumstances so indicate.

A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal. For further discussion of control, see Comment f. The common-law definition of agency presupposes a principal who exists and who has legal capacity throughout the duration of the relationship; otherwise the principal will not be able on an ongoing basis to assess the agent's performance in relationship to the principal's interests. See § 3.04. The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. Comments d and f discuss, inter alia, the tension between these elements of the common-law definition and durable powers of attorney. The chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf.

d. Creation of agency. Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other. In contrast to the formulation in Restatement Second, Agency § 1, the definition in this section refers to a principal's manifestation of “assent,” not “consent.” The different terminology is intended to emphasize that unexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent. See Restatement Second, Contracts § 17, Comment c. If an agent is otherwise on notice of the meaning the principal ascribes to a particular expression, that meaning is operative as between principal and agent. See § 1.03, Comment e. A principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific. See § 1.03, which defines manifestation.

As to the agent, a relationship of agency as defined in this section requires that the agent “manifests assent or otherwise consents so to act,” in contrast to the requirement in Restatement Second, Agency § 1 that the agent “consent.” The formulation in this section, consistent with Restatement Second, recognizes that it is not necessary to the formation of a relationship of agency that the agent manifest assent to the principal, as when the agent performs the service requested by the principal following the principal's manifestation, or when the agent agrees to perform the service but does not so inform the principal and does not perform. It is a question of fact whether the agent has agreed.
Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract. See Restatement Second, Contracts § 71.

In some instances, however, relationships that are less than fully consensual and, therefore, not common-law agency relations trigger legal consequences equivalent to those of agency. A notable instance is a durable power of attorney. The basic presupposition that agency is a consensual relationship that vests in the principal the right of interim control over the agent is at odds with the relationship between principal and agent created by a durable power of attorney, a relationship in which the agent's power survives or is triggered by the principal's loss of mental competence. Once the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though in creating the power the principal consented initially to the mechanism that led to the later and less consensual relationship with the agent. Although no res exists, the relationship then resembles a trust. Durable powers are treated in § 3.08(2) and in Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment l.

Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties' consent is subject to constraints imposed by law or by legal or regulatory institutions. As a consequence of such constraints, the decision to appoint a particular agent or to continue the agency relation is not within the parties' exclusive control. For example, the law implies a principal-agency relationship between the owner of a lost item and government officials who recover it. Additionally, court-appointed counsel represents the client, notwithstanding the client's objection, and counsel's withdrawal from representation in litigation requires the court's assent. All attorneys are subject to ethical responsibilities that constrain the authority of their clients as principals.

Likewise, the legal consequences resemble those of common-law agency when an “agent's” powers are specified by operation of law, not by the parties. A statutory designation of the Secretary of State as agent to receive service of process is not a consensual choice of agent on the part of the principal or specification of the agent's powers but follows a choice to carry on activity in a particular state. In maritime law, under the 1989 International Convention on Salvage, a ship's master has authority to contract for salvage operations on behalf of the vessel's owner, and the master and the owner have authority to conclude such contracts on behalf of the owner of property on board the vessel. Additionally, the law may mandate that an agent be used to perform a particular function, such as the federal statutory requirement that stock in an employee ownership plan be held and voted by trustees.

e. Fiduciary character of relationship. The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word “fiduciary” appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.

As a general matter, the term “fiduciary” signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. See Comment g for a discussion of “acting on behalf of.” See § 8.01 for an agent's basic duty of loyal action. Any agent has power over the principal's interests to a greater or lesser degree. This determines the scope in which fiduciary duty operates. An agent has such power even when the principal holds a superior economic position or possesses greater expertise or acumen.

To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element. The obligations that a principal owes an agent, specified in §§ 8.13- 8.15, are not fiduciary. In addition to an agent's fiduciary duties, the agent
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has a duty to fulfill specific contractual undertakings that the agent has made to the principal and to third parties, as well as to fulfill any duties imposed on the agent by law. Correlatively, a principal can owe duties created by contractual undertakings to the agent. Chapter 8 states the specific duties owed by the agent and the principal. Section 8.06 governs consent by the principal to conduct that would otherwise breach the agent's duties of loyalty.

Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship. Fiduciary duty does not operate in a monolithic fashion. Most questions concerning agents' fiduciary duty involve the agent's relationship to property owned by the principal or confidential information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity. It is open to question whether an agent's unconflicted exercise of discretion as to how to best carry out the agent's undertaking implicates fiduciary doctrines.

Three types of consequences result from an agent's fiduciary duties to the principal. First, if an agent breaches a fiduciary duty of loyalty, distinctive remedies are available to the principal. Moreover, burdens of proof are often allocated differently in cases alleging breach of fiduciary obligation than in civil litigation generally. A different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty. These points are elaborated in §§ 8.01 - 8.06.

Second, the content of an agent's duties to the principal is distinctive. Unless the principal consents as stated in § 8.06, an agent may not use the principal's property, the agent's position, or nonpublic information the agent acquires while acting within the scope of the relationship, for the agent's own purposes or for the benefit of another. Similarly, unless the principal consents as stated in § 8.06, an agent may not bind the principal to transactions in which the agent deals with the principal on the agent's own account without disclosing the agent's interest to the principal. Without the principal's consent, an agent may not compete with the principal as to the subject matter of the agency, nor may the agent act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed. See §§ 8.01 - 8.06 for a detailed treatment of these duties.

Third, the fiduciary character of an agent's position, on the one hand, and the principal's right to control the agent, on the other hand, are linked in a manner that differentiates both (a) the function of an agent-fiduciary from that of a nonagent-fiduciary and (b) agency relationships from nonagency relationships that are defined and controlled solely by contract. An agent's fiduciary position requires the agent to interpret the principal's statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent. This rule for interpretation by agents facilitates and simplifies principals' exercise of the right of control because a principal, in granting authority or issuing instructions to an agent, does not bear the risk that the agent will exploit gaps or ambiguities in the principal's instructions. In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion. That is, the principal would be at greater risk in granting authority and stating instructions in a form that gives an agent discretion in determining how to fulfill the principal's direction. For organizational principals, this rule simplifies the process through which directions are communicated, understood, and executed within an organization. Accordingly, instructions need not be drafted with the detail and specificity that typify the instruments embodying the terms of many arm's-length commercial and financial relationships.

Illustrations:

Illustrations:
1. P Corporation manufactures tobacco products, including two brands of cigarettes. Brand C has the largest sales in North America. Brand D has fewer sales in North America but exceeds Brand C in worldwide sales, chiefly in less-developed countries. A is employed by P Corporation as the general manager of its cigarette division. A reports to P Corporation's Executive Vice President. A forms the beliefs that cigarette smoking is injurious to health and that it is socially desirable that fewer rather than more people smoke cigarettes. A does not disclose these beliefs to P Corporation. The Executive Vice President, intending to refer to Brand D, instructs A as follows: “Redirect all expenditures on advertising to the best-selling brand.” A believes that it is socially undesirable to export cigarette consumption in the face of a declining domestic market. A enters into an advertising contract with T Corporation, in which T Corporation will advertise Brand C exclusively. A has breached the fiduciary duty A owes to P Corporation. Although the Executive Vice President's direction to A did not precisely specify how to determine the identity of “the best-selling brand,” A's interpretation of the instruction was contrary to P Corporation's interests as A should reasonably have understood them. P Corporation is a party to the contract A made with T Corporation if T Corporation reasonably believed A had authority to make the contract. See § 2.03, which defines apparent authority. A lacked actual authority to make the contract because A could not reasonably believe P Corporation wished A to do so. See §§ 2.01-2.02, which define actual authority and its scope.

2. P, an operatic tenor, employs A as a business manager with authority to book P's performances. P directs A to book P to perform a concert in a particular concert hall owned by T. A knows that the acoustic quality of T's concert hall has recently deteriorated in quality due to an error made in remodeling. Neither the error nor the deterioration is public knowledge, and A has no reason to believe P knows of it. A books P to perform in T's concert hall without telling P about the acoustic deterioration because A hopes to obtain employment with T. A has breached A's fiduciary duty to P, even though A carried out P's literal instructions.

f. Principal's power and right of interim control.

(1) Principal's power and right of interim control—in general. An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established. Within an organization the right to control its agents is essential to the organization's ability to function, regardless of its size, structure, or degree of hierarchy or complexity. In an organization, it is often another agent, one holding a supervisory position, who gives the directions. For definitions of the terms “superior” and “subordinate” coagents, see § 1.04(9). A principal may exercise influence over an agent's actions in other ways as well. Incentive structures that reward the agent for achieving results affect the agent's actions. In an organization, assigning a specified function with a functionally descriptive title to a person tends to control activity because it manifests what types of activity are approved by the principal to all who know of the function and title, including their holder.

A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver.

A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands. A principal's power to give instructions, created by the agency relationship, does not mean that all instructions the principal gives are proper. An agent's duty of obedience does not require the agent to obey instructions to commit a crime or a tort or to violate established professional standards. See § 8.09(2). Moreover, an agent's duty of obedience does not supersede the agent's power to resign and terminate the agency relationship. See § 3.10.
The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make. In particular, if the service provider breaches a contractual obligation, the service recipient has a claim for breach of contract. The service provider may be constrained by both the existence of such an obligation and the prospect of remedies for breach of contract. The fact that such an agreement imposes constraints on the service provider does not mean that the service recipient has an interim right to give instructions to the provider. Thus, setting standards in an agreement for acceptable service quality does not of itself create a right of control. Additionally, if a service provider is retained to give an independent assessment, the expectation of independence is in tension with a right of control in the service recipient.

To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Illustrations:

3. P arranges with A for A to buy large quantities of coffee beans on P's behalf. The compensation agreed to is predicated on P's assurance that A will not need to travel abroad to make the purchases. Later P directs A to fly to Colombia to buy coffee beans. A has a choice. A may resign as P's agent. If A does not resign, A must obey the instruction but may have a claim against P for the increased cost of A's performance. A may waive the claim if A fails to remind P of P's assurance before departing for Colombia if it is reasonable to do so, for example if it appears that P has forgotten the assurance.

4. P owns a professional baseball team. Needing a new general manager, P negotiates an agreement with A, a manager. A insists that P provide an assurance in A's employment agreement that A will have autonomy in running the team. P agrees. Before the start of the season, P directs A to schedule no night games on weeknights during the school term. It is feasible for A to comply with P's directive. A must obey the instruction. Alternatively, A may resign. If A resigns, A has a contract claim against P. If A does not resign, A may have a contract claim against P, but A's ability to recover on the claim would depend, inter alia, on A's ability to show damage.

If an agent disregards or contravenes an instruction, the doctrine of actual authority, defined in § 2.01, governs the consequences as between the principal and the agent. Section 8.09 states an agent's duties to act only within the scope of actual authority and to comply with lawful instructions. The rights and obligations of the third party with whom the agent interacts are governed by the doctrines of actual authority and apparent authority. Doctrines of estoppel, restitution, and ratification are also relevant under some circumstances. See §§ 2.03, 2.05-2.07, and 4.01-4.08.

Illustrations:

5. Same facts as Illustration 4. After A learns of P's directive, A enters into a scheduling agreement with another team, owned by Q, under which P's team will play night games during the school term. Q has no notice of P's directive to
A. Although A lacks actual authority to bind P to the agreement, the agreement may bind P and Q if A acted with apparent authority.

6. Same facts as Illustration 5, except that Q has notice of P's instructions to A. Unless P ratifies A's conduct, neither P nor Q is bound by the agreement because A has neither actual nor apparent authority to bind P. Section 4.01(2) states the circumstances under which ratification occurs.

The principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally. Many positions and relationships give one person the ability to dominate or influence other persons but not the right to control their actions. Family ties, friendship, perceived expertise, and religious beliefs are often the source of influence or dominance, as are the variety of circumstances that create a strong position in bargaining. A position of dominance or influence does not in itself mean that a person is a principal in a relationship of agency with the person over whom dominance or influence may be exercised. A relationship is one of agency only if the person susceptible to dominance or influence has consented to act on behalf of the other and the other has a right of control, not simply an ability to bring influence to bear.

The right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken, which is integral to the right of control within common-law agency. Thus, a debtor does not become a creditor's agent when a loan agreement gives the creditor veto rights over decisions the debtor may make. Moreover, typically a debtor does not consent to act on behalf of the creditor as opposed to acting in its own interests.

The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority. See § 3.10 on the principal's power to revoke authority. Under the common law of agency, as stated in Restatement Second, Agency § 122(1), a durable agency power, one that survives the principal's loss of mental competence, was not feasible because of the loss of control by the principal. Section 3.08(2), like statutes in all states, recognizes the efficacy of durable powers, which enable an agent to act on behalf of a principal incapable of exercising control. Legitimating the power does not eliminate the risks for the principal that are inherent when the agent is not subject to direction or termination by the principal.

(2). Principal's power and right of interim control—corporate context. Many questions testing the nature of the right of control arise as a result of the legal consequences of incorporating or creating a juridical or legal person distinct from its shareholders, its governing body, and its agents. A corporation's agents are its own because it is a distinct legal person; they are not the agents of other affiliated corporations unless, separately, an agency relation has been created between the agents and the affiliated corporation. Similarly, the hierarchical link between a local union and its international affiliate does not by itself create a relationship of agency between the local and the international.

Although a corporation's shareholders elect its directors and may have the right to remove directors once elected, the directors are not the shareholders' nor the corporation's agents as defined in this section, given the treatment of directors within contemporary corporation law in the United States. Directors' powers originate as the legal consequence of their election and are not conferred or delegated by shareholders. Although corporation statutes require shareholder approval for specific fundamental transactions, corporation law generally invests managerial authority over corporate affairs in a board of directors, not in shareholders, providing that management shall occur by or under the board of directors. Thus, shareholders ordinarily do not have a right to control directors by giving binding instructions to them. If the statute under which a corporation has been incorporated so permits, shareholders may be allocated power to give binding instructions to directors through a provision in the corporation's articles or through a validly adopted shareholder agreement. The fact that a corporation statute may refer to directors as the corporation's "agents" for a particular purpose does not place directors in an agency relationship with shareholders for purposes of the common law of agency. In any event, directors' ability to bind the corporation is invested in the directors as a board, not in individual directors acting unilaterally. A director may, of course, also be an employee or officer.
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(who may or may not be an employee) of the corporation, giving the director an additional and separate conventional position or role as an agent. Fellow directors may, with that director's consent, appoint a director as an agent to act on behalf of the corporation in some respect or matter.

Illustrations:

Illustrations:

7. A is an employee of S Corporation. P Corporation owns all the stock of S Corporation. A is not an agent of P Corporation because P Corporation's only relationship with A is that P Corporation is the sole shareholder of A's employer.

8. Same facts as Illustration 7, except that S Corporation and P Corporation are incorporated in a jurisdiction that permits a corporation to provide in its articles of incorporation that the powers of the corporation's directors shall be exercised subject to written instructions given by the corporation's shareholders in a resolution adopted by a majority of the shareholders. S Corporation's articles contain such a provision. A is not an agent of P Corporation.

9. Same facts as Illustration 7, except that A and P Corporation agree that, in performing A's duties as an employee of S Corporation, A shall act as P Corporation directs in the interest of P Corporation. A consents so to act. A is an agent of P Corporation as well as of S Corporation.

g. Acting on behalf of. The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control. From the standpoint of the principal, this is the purpose for creating the relationship. The common law of agency encompasses employment as well as nonemployment relations. Employee and nonemployee agents who represent their principal in transactions with third parties act on the principal's account and behalf. Employee-agents whose work does not involve transactional interactions with third parties also act “on behalf of” their employer-principal. By consenting to act on behalf of the principal, an agent who is an employee consents to do the work that the employer directs and to do it subject to the employer's instructions. In either case, actions “on behalf of” a principal do not necessarily entail that the principal will benefit as a result.

In any relationship created by contract, the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present. A purchaser is not “acting on behalf of” a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent. However, courts may treat a trademark licensee as the agent of the licensor in certain situations, with the result that the licensor is liable to third parties for defective goods produced by licensees.

Illustrations:

Illustrations:

10. P Corporation designs and sells athletic footwear using a registered trade name and a registered trademark prominently displayed on each item. P Corporation licenses A Corporation to manufacture and sell footwear bearing P Corporation's trade name and trademark, in exchange for A Corporation's promise to pay royalties. Under the license agreement, P Corporation reserves the right to control the quality of the footwear manufactured under the license. A Corporation enters into a contract with T to purchase rubber. As to the contract with T, A Corporation is not acting as P Corporation's agent, nor is P Corporation the agent of A Corporation by virtue of any obligation it may have to
defend and protect its trade name and trademark. P Corporation's right to control the quality of footwear manufactured by A Corporation does not make A Corporation the agent of P Corporation as to the contract with T.

11. Same facts as Illustration 10, except that P Corporation and A Corporation agree that A Corporation will negotiate and enter into contracts between P Corporation and retail stores for the sale of footwear manufactured by P Corporation. A Corporation is acting as P Corporation's agent in connection with the contracts.

12. P Corporation, a financial-services firm, licenses A Corporation, a supermarket chain, to sell P Corporation's money-transfer service through A Corporation's supermarkets. P Corporation's agreement with A Corporation requires A to handle transactions in accord with P's operating procedures and to maintain records accessible by P. To use the service, a customer remits cash at an A Corporation supermarket. The intended recipient of the cash, upon presentation of appropriate identification, may collect it at another A Corporation supermarket or other outlet licensed by P Corporation. Once an A Corporation supermarket accepts cash from a customer, P is bound to wire cash in that amount to the outlet specified by the customer. A Corporation is P Corporation's agent in activities connected with the money-transfer service.

13. P owns a shopping mall. A rents a retail store in the mall under a lease in which A promises to pay P a percentage of A's monthly gross sales revenue as rent. The lease gives P the right to approve or disapprove A's operational plans for the store. A is not P's agent in operating the store.

14. Same facts as Illustration 13, except that A additionally agrees to collect the rent from the mall's other tenants and remit it to P in exchange for a monthly service fee. A is P's agent in collecting and remitting the other tenants' rental payments. A is not P's agent in operating A's store in the mall.

An actor who acts under the immediate control of another person is not that person's agent unless the actor has agreed to act on the person's behalf. For example, a foreman or supervisor in charge of a crew of laborers exercises full and detailed control over the laborers' work activities. The relationship between the foreman and the laborers is not an agency relationship despite the foreman's full control, nor is their relationship one of subagency. Section 1.04(8) defines subagency. The foreman and the laborers are coagents of a common employer who occupy different strata within an organizational hierarchy. See § 1.04(9), which defines “superior” and “subordinate” coagents. The foreman's role of direction, defined by the organization, does not make the laborers the foreman's own agents. The laborers act on behalf of their common employer, not the foreman. Likewise, the captain of a ship and its crew are coagents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship's owner.

It is possible to create a power to affect a person's legal relations to be exercised for the benefit of the holder of the power. Such powers typically are created as security for the interests of the holder or otherwise to benefit a person other than the person who creates the power. Consequently, the holder of such a power is not an agent as defined in this section, even though the power has the form of agency and, if exercised, will result in some of agency's legal consequences. The creator does not have a right to control the power holder's use of the power, and the power holder is not under a duty to use it in the interests of the creator. Sections 3.12- 3.13 specifically treat powers given as security.

Illustrations:

15. P, a building contractor, has a credit account with T, a seller of building supplies. P tells F, P's impecunious friend, that F may buy building supplies on P's account from T for F's own use. P must pay the charges that F incurs on P's account with T. F is not P's agent in buying the building supplies because F is not acting on P's behalf.
16. Same facts as Illustration 15, except that P tells F to make purchases from T and charge them to P's account only to meet P's needs. F is P's agent in making the purchases and charging them to P's account.

17. P lends A money to purchase a piece of property, taking a mortgage on the property as security. The mortgage gives P the power to sell the property if A defaults on the loan. In exercising the power of sale, P does not act as A's agent because P is acting, not on A's behalf, but to protect P's interest as mortgagee.

Relationships of agency are among the larger family of relationships in which one person acts to further the interests of another and is subject to fiduciary obligations. Agency is not antithetical to these other relationships, and whether a fiduciary is, additionally, an agent of another depends on the circumstances of the particular relationship. For example, as defined in Restatement Third, Trusts § 2, a trust is a fiduciary relationship with respect to property that arises from a manifestation of intention to create that relationship; a trustee is not an agent of the settlor or beneficiaries unless the terms of the trust subject the trustee to the control of either the settlor or the beneficiaries. Principals in agency relationships have power to terminate authority and thus remove the agent; trust beneficiaries, in contrast, do not have power to remove the trustee.

As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes. All are sentient and, capable of disloyal action, all have the duty to act loyally. For further discussion of the scope of fiduciary duty, see § 8.01, Comment c.

Illustration:

18. A is an assembly-line worker in an aircraft manufacturing plant owned by P Corporation. A's work consists solely of inserting rivets that fasten components in aircraft bodies. A's foreman tells A to speed up production. A asks why, and the foreman responds, “The top-secret word from the plant manager is that P Corporation has received a large contract from the Defense Department.” “So, is this a one-time thing?” asks A. “No,” replies the foreman. “They're going to have to expand the plant because the contract will require more manufacturing space.” After the day's work, as a result of what A has been told by the foreman, A buys an option to purchase land adjacent to the plant. The land is the only space on which the plant might feasibly expand. A's purchase of the option breaches A's fiduciary duty to P Corporation because it constitutes a use of nonpublic information of P Corporation without P Corporation's permission. See § 8.05(2).

h. Intermediaries. Many actors perform an intermediary role between parties who engage in a transaction. Not all are agents in any sense, and not all who are agents act on behalf of those who use the intermediary service provided. For example, an employee of a courier service who shuttles documents among parties who are closing a transaction among them is not the parties' agent simply because an intermediary function is provided.

Agents who perform intermediary functions vary greatly in the nature of the services provided. Variable as well are the scope of the agency relationship and its consequences for the principal. At the modest end of the spectrum, a translator employed by a principal in negotiations enables the principal's words to be understood by others and enables the principal to understand the language used by others. The translator does not occupy a role that conventionally involves identifying parties with whom the principal might deal or a role that confers discretionary authority to determine whether to commit the principal to the terms of a proposed transaction or to initiate or vary terms for the principal. Nonetheless, the translator's relation to the principal is
one of agency. The translator acts on the principal's behalf and the principal has the power to provide interim instructions as to how the translation shall be done.

If an intermediary lacks authority even to negotiate on behalf of a party, characterizing the intermediary as an agent may not carry much practical import because the scope of the agency would be very narrow. But despite the narrowness of its scope, an agency relation imposes legal consequences when the agent's acts are within its scope. In some circumstances, an agent's inaction will have legal consequences for the principal.

Illustration:

19. P appoints A an agent to receive service of process. P instructs A, “Anything with which you are served in my name, send it to me by express service.” A is served with a complaint in an action that names P as a defendant. A does not send the complaint to P, causing P to miss the deadline for filing an answer to the complaint. As a consequence, P's adversary in the lawsuit obtains a default judgment against P. A's receipt of process is within the scope of A's authority. P is bound by its consequences.

Farther along the spectrum, an intermediary who is a finder conventionally serves the function of identifying or introducing to each other prospective parties to transactions but does not engage in negotiations. Intermediaries who are brokers, on the other hand, negotiate on behalf of the principal. Some agents have authority to commit the principal to the terms of a transaction. An individual actor's role may evolve over the course of a transaction, expanding or shrinking the scope of any agency relationship. Moreover, an agent may assume a pivotal role in the course of a transaction, a role that may commence with relaying information from one party to another but then encompass explanations and clarifications, all of which induce reliance by the recipient.

Ordinarily, the scope of an agency relationship is defined solely by the parties to the relationship. Legislation may address specific transactions. For example, several states have legislation concerning residential real estate that permits prospective buyers and sellers to enter into agreements with real-estate brokers that modify or reconfigure the duties that the common law of agency has conventionally imposed on the broker with whom property is listed, and on brokers who assist prospective purchasers. For discussion, see § 3.15, Comment f.

Reporter's Notes

a. Comparison with Restatement Second, Agency, and codifications. The black letter for this section is consistent with the substance of the definition in Restatement Second, Agency § 1, except for the introduction of “assent,” as explained in Comment d. The term “relationship” replaces “relation” to reflect contemporary usage. The commentary to this section addresses the essential elements of the agency relation, consistently in substance with Restatement Second, Agency §§ 12-14.

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The Louisiana Code defines two distinct types of agency, procuration and mandate. Procuration is “a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations. The procuration may be addressed to the representative or to a person with whom the representative is authorized to represent the principal in legal relations.” La. Civ. Code Art. 2987 (Supp. 2004). A mandate is “a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.” Id. Art. 2989. As procuration is defined by Art. 2987, the principal may confer authority on the representative without the representative's knowledge or acceptance. The fact that procuration is defined as a unilateral juridical act makes it an “offer to contract” under the Civil Code's provisions on consent, La. Civ. Code Bk. III, T. IV, ch. 3, arts. 1927-1947. Such an act requires the eventual consent of the representative in order to become a contract of mandate and create its effects.

b. Usage. In economics, the classic definition is Michael Jensen & William Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308-309 (1976) (“[w]e define an agency relationship as a contract in which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent.”). On accounts of agency in economics contrasted with legal conceptions and consequences of agency relationships, see Daniel Spulber & Ramon Casadesus-Masanell, Trust and Incentives in Agency, ___ S. Cal. Interdisc. L.J. ___ (forthcoming 2005). On usage within philosophy, see, e.g., Charles Taylor, Human Agency and Language: Philosophical Papers I, at 99 (1985) (boundary between agents and “mere things” is mistakenly specified by others by a criterion of performance, while “[w]hat is crucial about agents is that things matter to them…. To say that things matter to agents is to say that we can attribute purposes, desires, aversions to them in a strong, original sense.”).

The classic illustration of an agency relationship formed when the parties had other significant legal relationships with each other is Thayer v. Pacific Elec. Ry. Co., 360 P.2d 56 (Cal.1961) (holding finder of fact could conclude that, by making notation of damage on freight bill at shipper's request, railroad's station agent acted as shipper's agent for purposes of giving notice of shipper's intention to file claim for damage to shipment).

For the point that an agent may additionally be a principal, see American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir.1999) (shipyard acted as owners' agent in contracting for classification services but acted in part on its own behalf as well because hiring classification society fulfilled contractual undertaking to shipowners; shipyard thus derived sufficient benefit to be bound by arbitration clause in agreement with classification society); Obras Civiles, S.A. v. ADM Sec., Inc., 32 F.Supp.2d 1018, 1023 (N.D.Ill.1999) (under terms of payment-commitment letter, agent incurred obligation to repay money deposited by third party, although money was deposited into account of disclosed principal).

c. Elements of agency. The treatment of “power” as distinct from “authority” appears in Francis M.B. Reynolds, Bowstead & Reynolds on Agency 5-6 (17th ed. 2001). For a discussion of how these concepts evolved in Nordic legal codes, in contrast to common-law doctrine, see Hugo Tiber, Power and Authority in the Law of Agency 57, in Lex Mercatoria (Francis Rose ed. 2000). Statements that an agent has the “ability” to affect the principal's legal relationship may be assertions about power not limited to authority. For an example, see Chemtool, Inc. v. Lubrication Techs., Inc., 148 F.3d 742, 745 (7th Cir.1998).

A lawyer is characterized as the client's agent in Restatement Third, The Law Governing Lawyers, Chapter 2, Introductory Note (“A lawyer is an agent, to whom clients entrust matters, property, and information….”). Defining the scope of a lawyer's agency relationship with a client is, of course, a separate matter.

An identification between agent and principal is the linchpin of some accounts of agency. “This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work. But it receives the sanction of Sir Henry Maine, and I believe that it must stand as expressing an important aspect of the law, if, as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves. There is no trouble in understanding what is meant by saying that a slave has no legal
standing, but is absorbed into the family which his master represents before the law.” Oliver Wendell Holmes, The Common Law 232 (1923) (citations omitted). When a principal is a corporation, identifying any particular agent with the principal requires the court to determine whether the agent should be treated as the corporation’s alter ego. For a trenchant critique of Anglo-New Zealand cases in this tradition, see Peter Watts, The Company’s Alter Ego—A Parvenu and Impostor in Private Law, [2000] N.Z. L. Rev. 137. An explanation for this tradition is that it originated in criminal law, in which “[t]he individual human being remains … the paradigmatic subject…. This means that in both doctrinal scholarship and legal theory, the debate about the liability of corporations is marked by the sustained use of metaphors, contrasts, images which depend upon the analogies and disanalogies between ‘corporate’ and ‘human’ persons.” Nicola Lacey, Philosophical Foundations of the Common Law: Social not Metaphysical, in Oxford Essays in Jurisprudence, Fourth Series 17, 25 (Jeremy Horder ed., 1999). Professor Lacey’s underlying assumption is that, whether a person is an individual or a corporation, “legal personality is not straightforwardly descriptive; rather, it makes reference to the conditions under which it is true to say that some social phenomenon—human, corporate, or other—may be held liable in law.” Id. at 26.

The term “independent contractor” is defined in Restatement Second, Agency § 2(3) as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.” See also Wiggs v. City of Phoenix, 10 P.3d 625, 628 (Ariz.2000) (“While it is always the case that an independent contractor is not a servant, it is not always the case that an independent contractor is not an agent”). In contrast, the preceding standard text defined an independent contractor as a person who was not an agent under the common-law definition. See 1 Floyd R. Mechem, 1 A Treatise on the Law of Agency § 40 (2d ed. 1914) (defining “independent contractor” as “one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it.”). Usage in Restatement Second, Agency, is characterized as “ambiguous” in J. Dennis Hynes, Agency, Partnership & the LLC xxxii (5th ed. 1998). See also John J. Slain, Charles A. Thompson & Freda F. Bein, Agency, Partnership & Employment: A Transactional Approach xii (1980) (stating authors’ determination to use term “independent contractor” as little as possible due to confusion as to its meaning); Francis M.B. Reynolds, Bowstead & Reynolds on Agency 22 (17th ed. 2001) (expressing doubt that agency terminology “can be reduced to a satisfactory scheme.”).

d. Creation of agency. A relationship of agency requires consent of both principal and agent. See, e.g., B & G Enters., Inc. v. United States, 220 F.3d 1318, 1323 (Fed.Cir.2000) (no agency relationship between federal government and state on basis that state enacted restrictions on tobacco vending machines to satisfy condition for federal funding; no manifestation by either federal government or state of intent to create relationship of agency); Judah v. Reiner, 744 A.2d 1037, 1040-1041 (D.C.2000) (demonstrating existence of agency relationship requires showing that person alleged to be principal knew of and consented to representations made by persons who held themselves out as representatives).

If a person asserted to be an agent is aware of a would-be principal’s effort to create an agency relationship but does not affirm or repudiate it, and does not act consistently with it, the person is not an agent. See Fred Striffler, Inc. v. General Motors Corp., 73 N.W.2d 526, 532 (Mich.1955). An agent’s manifestation of consent is insufficient by itself to establish agency. See Page v. Boone's Transport, Ltd., 710 A.2d 256, 257 (Me.1998).

For a discussion of possible meanings that may be ascribed to “assent,” see Margaret Jane Radin, Humans, Computers, and Binding Commitment, 75 Ind. L.J. 1125, 1141 (2000).

For examples of actors who gratuitously undertake to serve as agents, see, e.g., Frawley v. Nickolich, 41 S.W.3d 420, 422 (Ark.App.2001) (friend of bail bondsman who distributed bondsman's business cards at jail, in violation of anti-solicitation statute, acted as bondsman's agent; friend given cell-phone contact for bondsman and instructed to obtain information on callers’ “bonding needs”); Sanders v. Bowen, 396 S.E.2d 908, 909-910 (Ga.App.1990) (in action brought by dog-bite victim, owner of
pit bull charged with son's knowledge of dog's actions when son was responsible for dog's care); \textit{Bostic v. Dalton}, 158 S.W.3d 347 (Tenn. 2005) (father acted gratuitously as his daughter's agent in supervising construction of her residence; father within exemption from liability for residential owners under workers'-compensation statute, Tenn. Code Ann. § 50-6-113(f)(1) (1999)).

On the agency relationship deemed to exist between an owner of lost property and government officials who recover it, see \textit{United States v. Portrait of Wally}, 105 F.Supp.2d 288, 294 (S.D.N.Y. 2000) (agency relationship, not dependent on principal's consent, deemed to exist because government officials hold stolen property on behalf of the owner; property thereafter is no longer treated as stolen). But cf. \textit{United States v. Portrait of Wally, a Painting by Egon Schiele}, 2002 WL 553532, at *15 (S.D.N.Y. 2002) (revised factual allegations in government's subsequent amended complaint extinguish basis for characterizing officials who seized painting as agents of its owners; officials were unaware that painting had been stolen and did not act subject to a duty to return it).

On the stock holding and voting requirements in employee stock-ownership plans, see \textit{Preston v. Allison}, 650 A.2d 646 (Del. 1994). In \textit{Preston}, the nominee holder voted the plan's shares incorrectly and contrary to instructions given by the plan participants. The court granted declaratory relief, with the consequence that the plaintiffs were declared to be the duly elected directors, thereby ousting the defendants. The court distinguished the circumstances in the immediate case from precedents in which shareholders were held to assume the risk that a nominee holder might vote shares incorrectly because in those cases the shareholders voluntarily chose to hold their stock in a nominee name. The court's distinction appears to reflect a concern to protect the integrity of the shareholder franchise from errors made by agents when the decision to use the agent is not voluntary. See 650 A.2d at 649, distinguishing \textit{Enstar Corp. v. Senouf}, 535 A.2d 1351 (Del. 1987) and \textit{American Hardware Corp. v. Savage Arms Corp.}, 136 A.2d 690 (Del. 1957).


e. \textit{Fiduciary character of relationship.} For another illustration of the appearance of “fiduciary” in a black-letter definition, see \textit{Restatement Third, Trusts} § 2 (“[a] trust, as the term is used in this Restatement when not qualified by the word ‘resulting’ or ‘constructive,’ is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee”). Trustees' duties in particular contexts may be limited to fulfilling the express terms of the governing instrument and avoiding conflicts of interest. See \textit{Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.}, 838 F.2d 66, 71 (2d Cir. 1988) (indenture trustee owes debenture holders no implicit pre-default duties; indenture trustee did not breach duty to debenture holders by waiving issuer's duty to give 50 days' advance notice of redemption of debentures when result was to save issuer one quarter's interest payment otherwise owed to debenture holders).

Some courts characterize fiduciary obligation in a manner that is inconsistent with a precise formulation. The best-known example is \textit{SEC v. Chenery Corp.}, 318 U.S. 80, 85-86 (1943) (“to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?”).

While some courts treat “fiduciary duty” as a synonym for “duty of loyalty,” others do not. Compare \textit{O'Malley v. Boris}, 742 A.2d 845, 849 (Del. 1999) (as an agent, a stock broker “has a duty to carry out the customer's instructions promptly and accurately. In addition, the broker must act in the customer's best interests and must refrain from self-dealing unless the customer consents, after full disclosure. These obligations at times are described as fiduciary duties of good faith, fair dealing, and loyalty”) (footnotes omitted) and \textit{General Motors Acceptance Corp. v. Crenshaw, Dupree & Milam L.L.P.}, 986 S.W.2d 632, 636 (Tex.App. 1998) (agent's fiduciary duties “include a duty of good faith and fair dealing”) with \textit{Condon Auto Sales & Serv., Inc. v. Crick}, 604 N.W.2d 587, 599 (Iowa 1999) (employer claims against employees alleging unfair competition and self
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dealing are often brought as claims for breach of fiduciary duty because “a principal-agent relationship gives rise to a fiduciary
duty of loyalty, and an employer-employee relationship can be closely associated with a principal-agent relationship”). For an
argument that greater precision in terminology would be desirable, see Sarah Worthington, Fiduciaries: When Is Self-Denial
Obligatory, 58 Cambridge L.J. 500, 503 (1999) (“In short, fiduciary terminology should be used carefully and restrictively, so
that fiduciary law operates only to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and
other equitable obligations (such as breach of confidence”).

For the significance of the scope of the relationship to the extent of an agent's fiduciary duties, see Fulcrum Fin. Partners v.
Meridian Leasing Corp., 230 F.3d 1004, 1013 (7th Cir.2000) (former general partner that retained authority as agent to remarket
computer equipment owned by lessor did not breach fiduciary duty to lessor by providing upgrade service to lessor's customer
without giving lessor opportunity to provide upgrade; parties' agreement that terminated partnership expressly permitted
competitive activity and gave lessor no express right of first refusal on providing upgrade service when prior partnership
agreement provided lessor right of first refusal); Sonnenschein v. Douglas Elliman-Gibbons & Ives, 753 N.E.2d 857 (N.Y.2001)
(real-estate broker did not breach fiduciary duty it owed to owner of apartment by showing other properties to prospective
purchaser, absent any restriction to contrary in agreement between broker and owner).

For the general proposition that employees owe duties of loyalty to their employer, see Employee Duty of Loyalty: A State-

For an early articulation of the linkage between faithful execution of the principal's instructions and the fiduciary character of
agency, see Short v. Skipwith, 22 F.Cas. 9, 10-11 (D.Va.1806) (No. 12,809) (Marshall, C.J.) (despite fact that principal was
in France and agent was in Virginia, “it was to be expected, that the orders of the [principal] would not be disobeyed, and his
remote situation incurred the obligation not altogether to neglect any part of his business”; agent is accountable for lost profit
suffered by principal due to agent's failure promptly to invest principal's funds as directed, when value of security into which
principal directed investment rose because if remedy were limited simply to restoring funds with interest, “the encouragement
which such a decision would give to dangerous and corrupt practices in the intercourse between a principal and his agent, must
be apparent. It would hold forth an inducement, in every instance where extraordinary profit might be made, to divert trust
funds into other channels than those for which they were designed, to the great injury of a large portion of society.”).

On the distinction between fiduciary and other duties owed by an agent, see Bristol & West Bldg. Soc. v. Mothew, [1998] Ch. 1,
18 (C.A.) (per Millett, L.J.) (“Breach of fiduciary obligation connotes disloyalty or infidelity. Mere incompetence is not enough.
A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”).

A determination that partners are not subject to fiduciary constraints in an adversarial transaction is consistent with the
recognition that actions taken as an agent on behalf of the partnership implicate fiduciary standards. See Exxon Corp. v. Burglin,
4 F.3d 1294, 1301 (5th Cir.1993) (in making buyout offer to limited partners, general partner not subject to fiduciary duty of
disclosure but could rely on provision in partnership agreement permitting it to withhold information; “[i]n regard to the buyout
offer, Exxon was not acting on behalf of the partnership, representing both its and the limited partners’ interests. If it were, the
duty of good faith and fair dealing necessarily would be high, to avoid the problem of a general partner’s self-dealing.”).

For the proposition that only the scope of the agency limits an agent's fiduciary duties, see O'Malley v. Boris, 742 A.2d 845,
849 (Del.1999) (although clients gave their stockbroker relatively little discretionary authority, broker made choice of sweep-
account funds and thus is accountable for decision under fiduciary standards; clients alleged that broker breached its fiduciary
duties by switching sweep account to fund in which it had an interest, without telling clients how broker acquired its interest
in fund).
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For an illustrative discussion of the context-specificity of fiduciary obligation, see Gibbs v. Breed, Abbott & Morgan, 710 N.Y.S.2d 578, 582-583 (App.Div.2000). At issue in Gibbs was the behavior of two partners who left one law firm for another, followed by clients and employees. The court observed that “the fiduciary restraints upon a partner with respect to client solicitation are not analogous to those applicable to employee recruitment. By contrast to the lawyer-client relationship, a partner does not have a fiduciary duty to the employees of a law firm, which would limit its [sic] duty of loyalty to the partnership. Thus, recruitment of firm employees has been viewed as distinct and ‘permissible on a more limited basis than … solicitation of clients.’” quoting Robert Hillman, Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing From Law Firms, 55 Wash. & Lee L. Rev. 997, 1031 (1998).

For the agent's duty to act in the principal's interest, see Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 271 (3d Cir.) (en banc) (1998) (when customers place orders with securities broker and do not specify price at which order should be executed, “it is a reasonable inference that [customers], in placing their orders, sought their own economic advantage and that they would not have placed them without an understanding that the defendants would execute them in a manner that would maximize [customers'] economic benefit from the trade.”).

On the source or nature of an agent's fiduciary duty, it is relevant that no statutory provision alters or expressly permits alteration of the agent's fiduciary duty of loyalty. See Schock v. Nash, 732 A.2d 217, 225 (Del.1999) (“Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney”; holder of durable power breached fiduciary duties by gratuitously transferring substantially all of grantor's property to herself when power did not clearly state grantor's intention to permit gratuitous self-transfers to holder and holder did not present credible evidence that grantor knew of holder's intention to convey property to herself during grantor's lifetime).


For statements of fiduciary duties applicable to various nonagent fiduciaries, see Restatement Second, Contracts § 173; Restatement Third, Trusts (Prudent Investor Rule) § 170; Restatement Third, The Law Governing Lawyers §§ 60, 121-122; Principles of Corporate Governance: Analysis and Recommendations §§ 4.01 and 5.01.

For the proposition that a fiduciary's duty is not limited to following instructions, even when the instructions are stated clearly, see Evvtex Co. v. Hartley Cooper Assocs., Ltd., 102 F.3d 1327, 1333 n.7 (2d Cir.1996) (in addition to complying with clear instructions, agent or other fiduciary must also disclose relevant information). See also Estate of O'Neal v. United States, 81 F.Supp.2d 1205, 1225 (N.D.Ala.1999), vacated in part on other grounds, 258 F.3d 1265 (11th Cir.2001) (Alabama does not permit agent “to occupy a position that would allow him to profit as a result of that agency relationship”).

An employee-agent’s failure to disclose a conflicting interest is treated as a breach of fiduciary duty in Cameco, Inc. v. Gedicke, 724 A.2d 783, 789 (N.J.1999), even though the risk of conflict may well have seemed slight to the employee, who set up an independent business that serviced competitors of the employer: “To an employee, the possibility of conflict with the employer's interest may seem remote; to the employer, the possibility may seem more immediate. The greater the possibility that another occupation will conflict with the employee's duties to the employer, the greater the need for the employee to alert the employer to that possibility.”
“Cause” to terminate under an employment agreement may include withholding information about activities that divert energy and loyalty from the employer's enterprise. See Certified Sec. Sys., Inc. v. Yuspeh, 713 So. 2d 558, 564 (La.App.1998).

Duties stemming from relationships characterized as fiduciary are, in the present legal order, distinct from the consequences of relationships stemming solely from arm's-length contracting. That contract law may oblige parties to act with good faith, and to deal fairly with each other, may produce results that are different from the consequences of a fiduciary relationship. See, e.g., United Jersey Bank v. Kensey, 704 A.2d 38, 46 (N.J.Super.App.Div.1997) (lender who does not actively encourage borrower to rely on its advice while concealing its self interest is under no duty to disclose to borrower information lender may have that bears on financial viability of transaction borrower is about to enter).

On the general consequences of imposing fiduciary duty, see Tamar Frankel, Fiduciary Duties, in 2 New Palgrave Dictionary of Economics and the Law 127, 128 (1998) (ultimate effect of the law “is to provide entrustors with incentives to enter into fiduciary relationships, by reducing entrustors' risks and costs of preventing abuse of entrusted power…”).

(1) Principal's power and right of interim control—in general. Representative statements that control is an element in an agency relationship include MJ & Partners Rest. Ltd. P'ship v. Zadikoff, 10 F.Supp.2d 922, 931 (N.D.Ill.1998) (relationship of agency is considered fiduciary relationship as a matter of law in Illinois; “[t]o determine whether an agency relationship exists the court must consider two factors: (1) whether the principal has the right to control the manner and method in which agent performs his services, and (2) whether the agent has the power to subject the principal to personal liability”); Nichols v. Arthur Murray, Inc., 56 Cal.Rptr. 728, 731 (Cal.App.1967) (“[i]f, in practical effect, one of the parties has the right to exercise complete control over the operation by the other an agency relationship exists”); and Anderson v. Badger, 191 P.2d 768, 771 (Cal.App.1948) (“[i]f the one who is to perform the service is subject to control as to the manner of performance by the one for whom the service is rendered he is an employee, or agent, whereas, if he is not subject to control but is engaged to produce a certain result by means and in a manner of his own choosing he is an independent contractor”).

On the definition of control when the agent is not an employee, see Green v. H & R Block, Inc., 735 A.2d 1039, 1051 (Md.1999) (“[i]n sum, the control a principal exercises over its agent is not defined rigidly to mean control over the minutia of the agent's actions, such as the agent's physical conduct, as is required for a master-servant relationship. The level of control may be very attenuated with respect to the details. However, the principal must have ultimate responsibility to control the end result of his or her agent's actions; such control may be exercised by prescribing the agent's obligations or duties before or after the agent acts, or both”). Accord, Spencer v. Hendersen-Webb, Inc., 81 F.Supp.2d 582, 596 (D.Md.1999) (key to control is whether principal has “ultimate responsibility to control the end result of the agent's actions”; test may be satisfied by relationship between a creditor and a debt collector); Thrash v. Credit Acceptance Corp., 821 So. 2d 968, 972 (Ala.2001) (actor engaged by creditor to repossess car acted as agent when creditor retained control; creditor instructed actor to make no contact with debtor prior to repossession and, upon learning that actor lubricated debtors' driveways to facilitate repossession, directed that practice cease); Policy Mgmt. Sys. Corp. v. Indiana Dept. of State Revenue, 720 N.E.2d 20, 25 (Ind.T.C.1999) (principal's control need not be complete but cannot consist simply of right to dictate accomplishment of a desired end). See also Scally v. Hilco Receivables, LLC, 392 F.Supp.2d 1036, 1040 (N.D.Ill.2005) (collection firm was not agent of assignee of defaulted debt; periodic reports from collection firm to assignee did not give assignee control of collection firm's activities); J & E Air, Inc. v. State Tax Assessor, 773 A.2d 452, 456-457 (Me.2001) (management agreement between airplane's owner and its primary user did not create relationship of agency although owner made some “management decisions”; primary user of airplane, not its owner, was in control during plane's use in interstate commerce, held license to fly plane, directed booking of chartered flights, and had “ultimate decisional authority”).

For the proposition that a judicially appointed receiver is not the agent of the municipality whose affairs the receiver administers, see Canney v. City of Chelsea, 925 F.Supp. 58, 64-65 (D.Mass.1996) (court's right to control receiver means receiver is not agent of municipality; relationship between receiver and court is “agency-type” but not necessarily one of common-law agency).
Control, however defined, is by itself insufficient to establish agency. In the debtor-creditor context, most courts are reluctant to find relationships of agency on the basis of provisions in agreements that protect the creditor's interests. See, e.g., Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir.1973), modified & reh'g denied, 490 F.2d 916 (5th Cir.1974); Buck v. Nash-Finch Co., 102 N.W.2d 84 (S.D.1960). In contrast, allegations of lender control over actors within the borrower's organization are consistent with a relationship of agency created on behalf of the creditor. Compare Citibank, N.A. v. Data Lease Fin. Corp., 828 F.2d 686, 692 (11th Cir.1987) (director of borrower testified in deposition that he worked for lender and worked closely with it in matters of policy) with Pearson v. Component Tech. Corp., 247 F.3d 471, 501 (3d Cir.2001) (unrebutted testimony of individual alleged to function as secured creditor's agent within borrower denying that creditor controlled his actions). An unusual example to the contrary is A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn.1981). In Jenson Farms, the court held that the borrower was the agent of its lender on the basis of the lender's control, when the lender purchased virtually all of the debtor's output and financed all of its operations. In the borrower's final days of operation, it was run directly by an official sent by the lender. The court determined, moreover, that the borrower was not a supplier of goods to the lender because the borrower did not have an independent business. The court relied on Restatement Second, Agency § 14O, which states that “[a] creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business.” For an analysis of cases involving debtor-creditor relationships, see J. Dennis Hynes, Lender Liability: The Dilemma of the Controlling Creditor, 58 Tenn. L. Rev. 635 (1991).

Setting standards for mortgage paper that a financial institution would purchase from an originating lender does not create a right of control in the financial institution. See Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A., 694 So. 2d 827, 832-833 (Fla.App.1997). See also Enterprise Press, Inc. v. Fresh Fields Mkts., Inc., 13 F.Supp.2d 413, 416 (S.D.N.Y.1998) (vendor not agent of marketing client; client's proofreading and slight corrections to drafts produced by vendor retained by marketing firm did not constitute sufficient exercise of control). The right to enforce contractually defined standards regarding procedures to assure service quality does not establish that a medical clinic is the agent of a hospital, even though the agreement creates a situation of “broader, more general influence or control” over the clinic. See Hefner v. Dausmann, 996 S.W.2d 660, 666 (Mo.App.1999). See also Maruho Co. v. Miles, Inc., 13 F.3d 6, 11 (1st Cir.1993) (relationship between patent licensor and licensee was not relationship of agency, although licensor's ability to deny extension of license enabled it to influence terms of sublicenses; license agreement gave licensor no right to participate in or control licensee's negotiation or grant of sublicenses).


A bailee's freedom from control by the bailor establishes that the bailee is not the bailor's agent. A bailor's failure to assert control does not by itself establish that the bailor lacked the right to do so, but it is suggestive that the right is not present. See Harris v. Keys, 948 P.2d 460, 465 (Alaska 1997) (owner of motor home in remote location who asked friend to occupy it to discourage theft from site did not control friend's conduct in home; in determining whether owner is subject to vicarious liability for injuries caused by occupant's conduct, court holds that owner's failure to exercise control despite friend's near-destruction of motor home suggests lack of ability to control).

Employment agreements resembling the agreement in Illustration 4 are problematic when entered into by a corporation's directors with a senior officer because the agreement may be understood to evidence the directors' abdication of ultimate managerial responsibility. See Grimes v. Donald, 20 Del. J. Corp. L. 757 (Del.Ch.1995), aff'd, 673 A.2d 1207 (Del. 1996) (employment agreement explicitly assured chairman and CEO that directors would not “unreasonably interfere” with his work and defined CEO's good-faith determination of “unreasonable interference” to be constructive termination, which entitled CEO
to severance benefits; court characterizes agreement as unusual but not violative of directors' duties because severance benefits payable under agreement were not excessive).

(2) Principal's power and right of interim control—corporate context. On the relationship between local unions and international affiliates, see Intercity Maint. Co. v. Local 254 Serv. Employees Int'l Union, 62 F.Supp.2d 483, 496-497 (D.R.I.1999), vacated in part on other grounds, 241 F.3d 82 (1st Cir.2001) (“traditional rules of agency law" define circumstances in which international union is responsible for illegal acts of local).

For the proposition that a parent-subsidiary relationship does not in itself create a relationship of agency, see, e.g., Manchester Equip. Co. v. American Way & Moving Co., 60 F.Supp.2d 3, 7 (E.D.N.Y.1999) (parent liable on agency theory for acts of subsidiary only if subsidiary had actual or apparent authority to act on parent's behalf). See also Motorsport Eng'g, Inc. v. Maserati SPA, 316 F.3d 26, 30 (1st Cir.2002) (fact that automobile distributor and manufacturer had common controlling shareholder does not establish that distributor signed contract with dealer as agent of manufacturer); Cellini v. Harcourt Brace & Co., 51 F.Supp.2d 1028, 1034 (S.D.Cal.1999) (subsidiary not agent of parent corporation for purposes of liability under fair employment statute in absence of showing that parent “exercised any control over [subsidiary's] day-to-day employment decisions”); Expeditors Int'l of Washington, Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F.Supp. 468, 482 (D.N.J.1998) (court cannot find absence of control as matter of law when self-characterized “family of companies” jointly participated in dealings in freight and shared employees and stock ownership). The foundational principle is that a parent corporation is not liable for acts of its subsidiaries simply because it owns the subsidiary's stock. See United States v. Bestfoods, 524 U.S. 51, 62 (1998) (general principle of corporate law is applicable to parent-corporation liability under CERCLA; nothing in legislation “purports to reject this bedrock principle”). For a statement of the circumstances under which a subsidiary corporation is treated as the agent of its parent, see Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, 849 (D.C.Cir.2000) (parent must manifest desire for subsidiary to act on parent's behalf, subsidiary must consent so to act, parent must have right to exercise control with respect to matters entrusted to subsidiary, “and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors”). See also In re Parmalat Sec. Litig., 375 F.Supp.2d 278, 294-295 (S.D.N.Y.2005) (allegations that member firm sought “direction and help” from global accounting firm and that global firm directed the removal of auditors on account sufficed as allegations of agency relationship).

The statutory basis for empowering shareholders to give binding instructions to directors is exemplified by Model Bus. Corp. Act § 2.02(b)(2)(iii) (permitting inclusion in certificate of incorporation of provision not inconsistent with law “defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders”) and § 7.32(a)(1) and (8) (permitting unanimously adopted shareholder agreement to contain provision that “restricts the discretion or powers of the board of directors” or “otherwise governs the exercise of the corporate powers … or the relationship among the shareholders, the directors, and the corporation, or among any of them, and is not contrary to public policy….”).

For the proposition that directors as such are not agents, see James D. Cox, et al., Corporations § 8.03 (2d ed. 2003). A leading treatise from the United Kingdom characterizes directors as agents, finding it preferable to characterize them using an analogy to agency as opposed to drawing an analogy to trustees. See Paul L. Davies, Gower on Company Law 598 (6th ed. 1997) (“[T]o describe directors as trustees seems today to be neither strictly correct nor invariably helpful. In truth directors are agents of the company rather than trustees of it or its property.”). Some corporation statutes treat directors as agents for specific purposes. See, e.g., Cal. Corp. Code § 317(a) (for purposes of indemnification section, term “agent” means a present or former director, officer, employee or other agent of corporation, or a person presently or formerly serving in such capacity in another enterprise at corporation's request). A corporation's statutory power to indemnify someone does not by itself establish that the person acted as the corporation's agent as defined by § 1.01. See VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 85 (Del.Supr.1998) (court holds that parent corporation's election of individual to board of wholly owned subsidiary establishes that individual served on the board “at the request” of parent corporation and thus may assert claims for indemnity against parent; court also observes
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in dictum that “this decision does not perforate the limitations on inter-firm liability that are a raison d'être of wholly-owned subsidiaries.”). For analysis, see Micah John Schruers, VonFeldt v. Stifel Financial Corp.: Clarifying the Scope of Delaware Corporate Indemnification Law, 25 J. Corp. L. 161 (1999). For an account more sympathetic to the general claim that directors may be characterized as shareholders' agents, see Robert A. Kessler, The Statutory Requirement of a Board of Directors: A Corporate Anachronism, 27 U. Chi. L. Rev. 696, 705 (1960). For examples of situations in which a board member served as an agent, see, e.g., Cromer Fin. Ltd. v. Berger, 245 F.Supp.2d 552, 561-562 (S.D.N.Y.2003) (partner in accounting firm allegedly served as member of committee of international association charged with, inter alia, strategic direction and practice integration of member firms' auditing work for off-shore investment funds; accounting firm charged with knowledge of information that partner acquired as member of committee concerning member's audit of fund when partner's familiarity with off-shore audits was basis for his committee membership); Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc., 815 A.2d 886 (Md.App.2003) (two members of board of physicians' network served as agents of network's majority shareholder, a hospital; hospital charged with knowledge of amendments to agreement between network and HMO).

g. Acting on behalf of. For the proposition that power to contract is a sufficient but not a necessary condition for agency, see Vanwyk Textile Sys., B.V. v. Zimmer Mach. America, Inc., 994 F.Supp. 350, 369 (W.D.N.C.1997) (jury was presented with evidence sufficient to find agency when sales agent represented manufacturer in negotiations with customers within price ranges set by manufacturer). See also O'Neill v. Department of HUD, 220 F.3d 1354, 1362 (Fed.Cir.2000) (federal conflict-of-interest legislation, 18 U.S.C. §§ 203(a)(1) and 207(a)(1), which refers to “acting … as agent or attorney for, or otherwise representing” a person distinguishes between services of agent and other representational services; in this context an “agent” is a representative authorized to act for another or a business representative empowered to commit principal to third parties).


In Illustration 10, P's right to control the quality of footwear manufactured under the license is conventionally understood to be necessary to avoid a “naked license,” which is deemed to be an abandonment of the trademark. See 2 J. Thomas McCarthy, McCarthy on Trademark and Unfair Competition § 18:42 (1998). See also Theo's & Sons, Inc. v. Mack Trucks, Inc., 729 N.E.2d 1113 (Mass.2000) (independent dealer's display of manufacturer's trademark sign did not constitute holding out as agent of manufacturer; assumption that dealer had agency relationship with manufacturer for purposes of doing warranty-related work does not create relationship of agency as to nonwarranty work).

The money-transfer business involved in Illustration 12 is subject to federal regulation. The Money Laundering Suppression Act of 1994, 31 U.S.C. § 5330(d)(1), requires all money-transmitting businesses to register with the Department of the Treasury. The Bank Secrecy Act authorizes the Secretary of the Treasury to require financial institutions and their agents to report any “suspicious transaction relevant to a possible violation of law or regulation.” See 31 U.S.C. § 5318(g)(1).

Trustees may also be agents, depending on the presence of a right of control and a right to dispose of property. A trustee holds title to property and may or may not be subject to the control of the settlor or, more unusually, the beneficiaries of the trust. See Restatement Third, Trusts § 2; S.E.C. v. American Bd. of Trade, Inc., 654 F. Supp. 361, 366 (S.D.N.Y.), aff'd, 830 F.3d 431 (2d Cir.1987). If title to property is transferred to a trustee and the transferee has a right to control the transferee, the transferee is both an agent and a trustee. See Chang v. Redding Bank of Commerce, 35 Cal.Rptr.2d 64, 70 (Cal.App.1995). Only “in rare
cases’ will a court remove a trustee at the request of beneficiaries; beneficiaries may not effect removal directly. See George T. Bogert, Trusts § 152, at 1541 (6th ed. 1987).

The outcome stated for Illustration 14 is supported by Clapp v. JMK/Skewer, Inc., 484 N.E.2d 918 (Ill.App.1985). See also Fasciana v. Electronic Data Sys. Corp., 829 A.2d 160, 170-171 (Del.Ch.2003) (for purposes of corporate-advancement statute, lawyer is not acting as corporation’s “agent” when not dealing with third parties); Cochran v. Stifel Fin. Corp., 2000 WL 286722 (Del.Ch.2000), rev’d in part on other grounds, 809 A.2d 555 (Del. 2002) (holding that person who serves as director, officer, or agent of subsidiary is not automatically an “agent” of parent corporation for purposes of 8 Del. C. § 145(c), which obligates corporation to indemnify agent to extent agent is successful in defense; and holding that suit brought by wholly owned subsidiary is not brought “by or in the right of” the parent for purposes of 8 Del. § 145(b), which governs claims for indemnity in connection with such actions). Illustrations 15 and 16 are variants on an example in Restatement Second, Agency § 14H, Comment a.

In United States v. O'Hagan, 521 U.S. 642 (1997), the Court applied the principle underlying Illustration 18 to explain that a lawyer's purchase of securities on the basis of nonpublic information received by the lawyer's firm from a client constituted a deceptive act for purposes of § 10(b) of the Securities Exchange Act of 1934 because it contravened the agent's duty of disclosure.

h. Intermediaries. On the range of roles that an agent may play in a real-estate transaction, including the provision and clarification of information, see Rawlinson & Brown Pty. Ltd. v. Witham & Anor, [1995] Austl. Torts R. 81 (N.S.W.App.1995).


For a typical example of a state statute applicable to transactions in residential real estate that expressly permits parties to modify the duties conventionally applicable to real-estate brokers, see Ohio Rev. Code Ann. §§ 4735.51-4735.74.

An intermediary who acts only as a person's amanuensis may not be characterized as the person's agent. See Estate of Stephens, 49 P.3d 1093 (Cal.2002) (upholding validity of deed signed at grantor's direction by interested amanuensis). For further discussion, see § 3.02, Comment c.


The terminology associated with particular intermediary functions may be specific to a particular trade or industry. For example, in the fine-arts and antiques trades, a “runner” has been characterized as a “private, free lance” dealer, typically reluctant to reveal the sources from which objects are obtained. See Mary McKenna, Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property, 12 U. Pa. J. Int'l BUS. L. 83, 116-117 n.160 (1991). A runner may attempt to sell work on behalf of a gallery in exchange for a commission. See Dark Bay Intr., Ltd. v. Aquavella Galleries, Inc., 784 N.Y.S.2d 514, 515 (App.Div.2004), leave to appeal denied, 825 N.E.2d 1093 (N.Y. 2005) (no evidence that fugitive from justice acted with actual authority as a runner or otherwise in agreeing to sell Picasso painting allegedly on gallery's
An empirical study of the consequences of the Georgia statute focuses on the encouragement it gives to buyers to retain their own agents. The average time to sell a house fell, suggesting that buyers' agency reduces search costs and enables agents better to match buyers with houses that will appeal to them. Prices of expensive houses fell, while prices of the less expensive houses did not. See Christopher Curran & Joel Schrag, Does It Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Agency Law, 43 J. Law & Econ. 265, 282-283 (2000). Ga. Code Ann. § 10-6A-1 et seq. Section 10-6A-7 specifies the duties owed by a buyer's broker. A broker does not breach any duty owed the buyer by showing properties to other purchasers, see § 10-6A-7(d), and the broker may provide defined types of ministerial assistance to the seller, see §§ 10-6A-7(C) and 10-6A-14. Section 10-6A-13 permits a brokerage firm to designate individual agents to represent different clients in the same transaction on an exclusive basis and provides that neither the firm nor the designated agents shall be deemed to be dual agents.
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E.D.Mich.
D.Minn.
D.N.J.Bkrtcy.Ct.
S.D.N.Y.
E.D.Pa.
M.D.Pa.
D.S.D.
S.D.Tex.
W.D.Tex.
E.D.Va.
W.D.Wash.
Ariz.
Colo.
Colo.App.
Conn.App.
Del.
D.C.App.
Ill.App.
Ind.
Iowa,
Iowa
Ky.
Mass.
Miss.
Miss.App.
Mo.App.
Neb.
N.J.
N.M.
N.Y.
N.Y.Sup.Ct.
Ohio
Okl.
Or.
Or.App.
S.C.App.
Tenn.
Tex.App.
Utah App.
Vt.
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Wash.
Wash.App.
W.Va.
Wis.
Wyo.

U.S.

U.S.2013. Cit. in diss. op. (general cites); coms. (e) and (f) quot. in sup. and quot. in case quot. in diss. op. Same-sex couples who wished to marry brought suit in federal court against California's governor, attorney general, and other state and local officials, arguing that Proposition 8, a ballot initiative passed by California voters that amended the California Constitution to define marriage as a union of a man and a woman, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. After defendants refused to defend the law, proponents of the initiative intervened to defend it. Following a bench trial, the district court entered judgment for plaintiffs, and the court of appeals affirmed. Vacating and remanding with instructions to dismiss the appeal for lack of jurisdiction, this court held that intervenors did not have standing to appeal the district court's order declaring Proposition 8 unconstitutional. The court reasoned that intervenors were not agents of the state of California, because the most basic features of an agency relationship were missing: intervenors did not answer to a principal, and lacked a fiduciary obligation. The dissent argued that principles of justiciability did not require California to demand a formal agency relationship in compliance with the Restatement when deciding who was entitled to appear in court to defend an initiative on its behalf if and when its usual legal advocates declined to do so. Hollingsworth v. Perry, 133 S.Ct. 2652, 2666-2668, 2670-2672, 2675.

C.A.1

C.A.1, 2012. Cit. in sup. Monastery brought a copyright-infringement action against archbishop who was a former member of monastery, alleging that archbishop posted on his website monastery's translations of ancient religious texts from their original Greek into English. The district court granted summary judgment for plaintiff. Affirming, this court held, inter alia, that, regardless of whether the law mandated a showing of volitional conduct to establish direct infringement, defendant engaged in sufficient acts of authority and control over the computer server and material actually posted that he could be held liable for direct infringement of plaintiff's works; because priest-monk who personally uploaded plaintiff's works to defendant's website acted as defendant's agent in both building and handling the technical aspects of the website, defendant as principal could be held liable for the authorized acts of monk as his agent. Society of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 56.

C.A.1, 2011. Cit. in sup. Purchasers whose deals to buy Florida condominium units fell through because they failed to obtain mortgage financing sued developer and its sales representative in Puerto Rico's federal district court, seeking the return of their earnest payments. The district court dismissed plaintiffs' action for want of jurisdiction over defendants. Vacating, this court held that, based on the incomplete record before it, it could not determine whether personal jurisdiction existed; it remanded for a determination of whether an agency relationship existed between developer's sales representative and Puerto Rican real-estate broker who put one plaintiff in touch with representative, and, if so, whether that agency relationship supported plaintiffs' claim of specific jurisdiction. The court noted that an agency relationship existed only if representative manifested its assent to have broker act on its behalf and subject to its control. Carreras v. PMG Collins, LLC, 660 F.3d 549, 556.

C.A.1, 2000. Cit. in fn. (T. D. No. 1, 2000). Customer-service representative for a truck-rental company sued the company for sex discrimination in violation of Title VII and the Maine Human Rights Act. The district court entered judgment on jury verdict awarding plaintiff compensatory and punitive damages. This court affirmed, holding, inter alia, that the district court properly decided to instruct the jury on the “integrated enterprise” test for determining single-employer status, because defendant
forfeited on procedural grounds its argument that common-law agency principles should have determined the single-employer issue. Romano v. U-Haul Intern., 233 F.3d 655, 662.

C.A.2, 2013. Quot. in ftn., coms. (f) and (g) quot. in sup. Customers brought a putative class action against online retail vendor of travel accommodations, asserting, among other things, a claim for breach of fiduciary duty arising from defendant's alleged failure to disclose that it would not accept a customer's bid unless it could locate a hotel room satisfying the customer's parameters at a rate lower than the bid amount, with defendant keeping the difference as a profit in addition to its stated service fee. The district court granted defendant's motion to dismiss. Affirming, this court held that, because plaintiffs did not sufficiently allege facts showing that an agency relationship existed between the parties, they failed to state a claim that defendant breached an agent's fiduciary duty of disclosure. The court reasoned that, once defendant's customers chose the reservation date, location, hotel quality, and bid price, they retained no right of interim control over defendant's procurement of the desired reservation, and this right of control was what distinguished an agency relationship from a mere contractual one. Johnson v. Priceline.com, Inc., 711 F.3d 271, 277-279.

C.A.7, 2014. Quot. in sup. Investors in a real-estate project who lost their loan funds when the project failed and was foreclosed upon by senior lender sued title company, as plaintiffs' putative agent for purposes of escrow and closing, alleging that defendant breached its fiduciary duty to inform them that they were not receiving the first-priority mortgage on the property that they had been promised by the real-estate developers. The district court granted summary judgment for defendant. Affirming, this court held that Illinois law did not impose such a duty on title company under the circumstances of this transaction, rejecting plaintiffs' argument that a principal–agency relationship existed between the parties. Referring to the definition of agency set forth in Restatement Third of Agency § 1.01, the court concluded that plaintiffs certainly never manifested their assent to defendant that it should represent their interests in the transaction. Edelman v. Belco Title & Escrow, LLC, 754 F.3d 389, 396.

C.A.7, 2014. Cit. in sup. Former gang leader was indicted by federal authorities based on statements to state authorities in which he confessed to playing a central role in a triple murder. A jury convicted defendant on all counts after the district court denied his pretrial motions to suppress the statements and dismiss the indictment, in which he argued that state authorities violated his due-process rights by prompting federal authorities to prosecute him based on the statements despite a prior immunity agreement, and that the federal government was responsible for the state's actions because it became the state's agent by investigating him and prosecuting him at the state's suggestion. Affirming, this court held that, even if state authorities violated defendant's due-process rights, a principal-agent relationship could not arise without the agent's agreement to be controlled by the principal, and defendant failed to present any evidence that the United States consented to be controlled by the state. U.S. v. Bryant, 750 F.3d 642, 651.

C.A.7

C.A.7, 2011. Quot. in sup. Insurer brought suit for a declaration of its obligations under a nontruckling/bobtail liability insurance policy it issued to insured truck driver, in connection with an underlying tort action brought against insured and others by estate of motorist killed in a vehicle accident with truck driven by insured. The district court granted summary judgment for plaintiff. Affirming, this court held that an exclusion in the policy for rented vehicles applied and barred coverage. The court concluded that insured was the agent of his wife, who was the titular owner of the truck, and that the existence of the agency relationship meant that it was possible for insured, as agent, to have entered into a lease to rent the truck to motor carrier that employed him,
and to subject his wife, as principal, to liability by doing so. The court reasoned that, after wife obtained ownership of the truck, she and insured made a family decision to put it in her name but have him drive it; she gave him permission to seek employment, sign a contractor operating agreement with motor carrier, and get an insurance policy; and he received payment for his efforts and deposited it into an account over which she had joint control. Clarendon Nat. Ins. Co. v. Medina, 645 F.3d 928, 935.

C.A.7, 2011. Quot. in sup. Defendant appealed his convictions for wire fraud and aiding and abetting wire fraud arising from his fleecing of investors through fictitious certificates of deposit sold by his financial corporation. This court affirmed the district court's judgment, rejecting defendant's argument that key evidence used against him at trial should have been suppressed as the fruit of a warrantless search because the source of the information, corporation's former corporate secretary, was acting as a government agent. The court saw no evidence to suggest that the government made secretary its agent before she started collecting materials on her own, and government did not direct her, initiate cooperation, or reward her for turning in the materials; further, secretary had a number of reasons why it was in her personal interest to help the government investigate the corporation, including the fact that she was afraid of defendant, who was her husband, and wanted to exonerate herself. U.S. v. Aldridge, 642 F.3d 537, 541.

C.A.9, 2013. Com. (g) quot. in sup. Consumers brought a putative class action against satellite-television provider and electronics retailer, alleging that defendants violated California's Unfair Competition Law and Consumer Legal Remedies Act by presenting certain satellite-service equipment, such as receivers and digital video recorders, as though they were for sale at retailer's stores, when, in fact, the transactions were leases with oppressive and unfair terms. On reconsideration, the district court granted defendants' motions to compel arbitration. Reversing in part and remanding, this court held, inter alia, that electronics retailer was not entitled to compel arbitration as satellite-television provider's agent, because no agency relationship existed between the two defendants. The court reasoned that, generally retailers were not considered the agents of manufacturers whose products they sold, and retailer in this case presented no evidence that provider controlled its behavior in ways relevant to plaintiffs' allegations. Murphy v. DirecTV, Inc., 724 F.3d 1218, 1232.

C.A.9, 2011. Cit. in sup., coms. (c) and (f) quot. in sup. Argentinian residents sued German corporation under the Alien Tort Statute and the Torture Victims Protection Act, alleging that defendant's Argentinian subsidiary collaborated with state-security forces to kidnap, detain, torture, and kill plaintiffs and/or their relatives during Argentina's “Dirty War.” The district court granted defendant's motion to dismiss for lack of personal jurisdiction. Reversing and remanding, this court held that defendant was subject to personal jurisdiction in California through the contacts of its U.S. subsidiary; defendant had more than enough control over its U.S. subsidiary to establish that U.S. subsidiary was defendant's agent for purposes of personal jurisdiction, because defendant had the right to control nearly every aspect of U.S. subsidiary's operations. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 922-924.

C.A.9, 2010. Cit. and quot. in sup.; com. (c) cit. in disc., cit. and quot. in diss. op., and quot. in ftn. to diss. op.; com. (f) cit. in disc. and quot. in diss. op.; com. (h) quot. in diss. op. United States filed perjury charges against professional baseball player who swore under oath that he had not taken performance enhancing drugs, after a lab was discovered to have recorded, under player's name, positive results of urine and blood tests for the drugs. The district court found inadmissible as hearsay a lab employee's testimony regarding trainer's statements that certain blood and urine samples he brought to the lab came from player. On interlocutory appeal, this court rejected the government's argument that trainer's statements, though not specifically authorized, were admissible because they came within the scope of an agency or employment relationship; trainer was an independent contractor, rather than an employee, and trainer was not player's agent for the limited purpose of the drug testing,
because there was no evidence that player directed or controlled any of trainer’s activities. The dissent argued that employee’s testimony was admissible because player authorized trainer to deal with the lab over the testing, not just to act as a courier, and thus impliedly authorized trainer to identify the origin of the samples he delivered to the lab. U.S. v. Bonds, 608 F.3d 495, 504, 506, 507, 514-517, 519, 527, 528.

C.A.9, 2009. Cit. in diss. op., com. (c) quot. in sup. and quot. in diss. op. Argentinean residents sued German manufacturer of motor vehicles, alleging human rights violations committed in Argentina by manufacturer’s Argentinean subsidiary during the 1970’s military regime. The district court granted defendant’s motion to dismiss for lack of personal jurisdiction. Affirming, this court, conducting a minimum-contacts analysis, held that the contacts of manufacturer’s United States subsidiary could not be imputed to manufacturer, because manufacturer’s United States subsidiary exercised insufficient control over and did not serve as manufacturer’s representative. The dissent argued that, at common law, agents could exercise a considerable amount of discretion in performing their functions, and that a less stringent showing of control was required for the limited purpose of establishing personal jurisdiction. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1096, 1099.

C.A.9, 2006. Coms. (c) and (d) quot. in ftn. Public-school student and her father sued school district under the Individuals with Disabilities Education Act (IDEA), seeking to recover attorney’s fees related to legal services provided by student’s mother, an attorney, in a series of disputes over student’s educational needs. The district court dismissed the complaint. Affirming, this court held that attorney-parents were not entitled to attorney’s fees for the representation of their children in IDEA proceedings. Explaining the policy behind its decision, the court stated that a disabled child represented by his or her parent did not always receive the benefit of an independent third-party’s judgment, as contemplated by the IDEA, and noted that an attorney-parent relationship could not be analogized readily to the typical agency relationship involved in an attorney’s representation of a client. Ford v. Long Beach Unified School Dist., 461 F.3d 1087, 1090.

C.A.9, 2003. Quot. in disc. (T.D. No. 1, 2000). Attorney sued website operator who had published on his Internet listserv network an e-mail message falsely accusing attorney of being a descendant of a Nazi official and having paintings that had been stolen from European Jews by Nazis. Attorney also sued company that paid website operator for displaying company’s logo and advertisements on website and listserv, alleging that company was vicariously liable for plaintiff’s reputational injuries. District court granted company summary judgment; this court affirmed in part, holding, inter alia, that company was not vicariously liable for operator’s actions because there was no principal-agent relationship between operator and company. Sponsorship agreement did not give company right to control what operator published on website and listserv. Batzel v. Smith, 333 F.3d 1018, 1035, rehearing and rehearing en banc denied 351 F.3d 904 (9th Cir.2003).


C.A.9, Bkrtcy.App. 2011. Cit. and quot. in disc., cit. in sup., com. (d) quot. in disc. and cit. in case cit. in disc., coms. (f) and (g) cit. in disc. Debtor objected to proofs of claim filed by party to master repurchase agreements through which party had sold debtor’s loans to buyer, alleging that party failed to show that it had express authority to file the proofs of claim as buyer’s authorized agent. The bankruptcy court held that party had authority to file the proofs of claim. Affirming, this court held that the bankruptcy court did not err when it determined that buyer’s express authorization for party to pursue buyer’s interests in debtor’s case necessarily included an authorization to file the disputed claims. In re Palmdale Hills Property, LLC, 457 B.R. 29, 47, 48, 50.

C.A.10,

C.A.10, 2013. Com. (c) and (e) quot. in sup. Retailer of replacement contact lenses brought a claim for service-mark infringement under the Lanham Act against competitor, alleging, among other things, that a third-party marketer hired by
competitor, known as an affiliate, had purchased keywords resembling plaintiff's 1800CONTACTS mark and was using the mark in the text of its online ads. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that defendant was not vicariously liable for its affiliate's allegedly infringing actions under agency law, because, even if the affiliate was an agent (or, more precisely, a subagent) of defendant, it lacked actual authority from defendant to include plaintiff's mark in ads for defendant, and defendant did not ratify the affiliate's actions. In making its decision, the court noted that proof of a fiduciary relationship was not necessary to show that an agency relationship existed. 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1250, 1251.

C.A.10

C.A.10, 2007. Com. (c) quot. in ftn. Former employee sued former employer, alleging breach of his employment contract and fraud, and employer counterclaimed for breach of loyalty and breach of fiduciary duty, alleging that employee had secretly participated in and owned at least four other businesses that competed or contracted with employer during his employment. The trial court granted employee's motion for judgment as a matter of law on the fiduciary-duty counterclaim. Reversing that portion of the decision and remanding, this court held, inter alia, that employee's agency relationship with employer created a fiduciary obligation. The court rejected employee's argument that his authority to act for employer in his role as senior regional manager was rather limited, noting, among other things, employee's admission that he had the ability to negotiate contracts with third parties on behalf of employer. Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1208.

C.A.10, 2006. Cit. in ftn. (T.D. No. 2, 2001). Federal prisoner was convicted of assault in federal district court for helping a friend attack a fellow inmate. This court, inter alia, affirmed the district court's denial of prisoner's pre-trial motion to suppress a statement that he made to FBI investigators after prison authorities, at friend's request, placed him in a cell next to friend, who then convinced him to confess. The court held, among other things, that friend was not acting as an agent for prison authorities in violation of prisoner's Fifth Amendment right to remain silent, invoked earlier by prisoner, because, while authorities admittedly facilitated and were incidental beneficiaries of the conversation between prisoner and friend, they did not use coercive tactics or direct or control friend, who acted for his own benefit and independently devised the plan to persuade prisoner to make the statement. U.S. v. Alexander, 447 F.3d 1290, 1295, cert. denied 549 U.S. 933, 127 S.Ct. 315, 166 L.Ed.2d 236 (2006).

C.A.D.C.

C.A.D.C.2013. Coms. (f) and (g) cit. in sup. City, which managed a port on lands granted to it by the state subject to a public trust benefiting the people of the state, petitioned for judicial review of an order issued by the Federal Maritime Commission, in which the Commission concluded that city was not entitled to sovereign immunity in defending a Shipping Act claim filed against it by an occupant of berths in the port. This court denied city's petition for review, rejecting city's port agency's argument that it was entitled to the immunity granted to states by the Eleventh Amendment on the basis that it functioned as a subordinate governmental agency of the state, and the state exercised virtually complete control over the port agency's administration of the tidelands pursuant to the public trust doctrine. The court reasoned that, far from establishing an agency relationship, the state's relationship with port agency—its ability to control city's management of the port only to the extent that city violated the public trust or tidelands grant—suggested the opposite. City of Oakland ex rel. Bd. of Port Com'rs v. Federal Maritime Com'n, 724 F.3d 224, 229.

C.A.D.C.2011. Cit. in sup. Indonesian villagers sued U.S. energy corporation, alleging that Indonesian military forces hired by defendant to guard its natural-gas facility committed genocide, extrajudicial killing, torture, and other human-rights abuses in violation of the Alien Tort Statute (ATS), as well as related common-law torts. The district court dismissed the complaint. Reversing in part and remanding, this court rejected defendant's claim of corporate immunity, holding that corporations could be found liable under the ATS. The court concluded that the source of law on the question of corporate liability under the ATS...
was supplied by federal common law, rather than customary international law, and that corporate liability was consistent with
the purpose of the ATS, with the federal common law of agency (under which corporations could be held liable for the torts
committed by their agents), and with sources of international law. Doe v. Exxon Mobil Corp., 654 F.3d 11, 51.

C.A.D.C.2009. Quot. in sup. Non-vessel-operating common carrier (NVOCC)—an intermediary between a shipper and an
ocean carrier—petitioned for review of an order of the Federal Maritime Commission that the use of unlicensed agents to assist
with providing NVOCC services was unlawful under the Shipping Act. Vacating the order and remanding, this court held that
the plain language of the Act's licensing requirement did not extend to agents of NVOCCs. The court noted that common-
law agency principles provided members of the public with adequate safeguards in their dealings with unlicensed agents of an
NVOCC, because, if an agent breached a contract or committed a tort, the disclosed NVOCC principal in whose name the agent
acted was subject to liability. Landstar Exp. America, Inc. v. Federal Maritime Com'n, 569 F.3d 493, 497.

of Agriculture order adjudging it guilty of commercial bribery and revoking its license to sell produce under the Perishable
Agricultural Commodities Act (PACA). This court denied the petition, holding, inter alia, that petitioner committed commercial
bribery, because the individuals to whom petitioner made payments were produce dealers' purchasing agents, rather than their
principals. The court rejected petitioners' argument that the payees were independent brokers and, as such, were principals
because they were subject to PACA, stating that PACA defined brokers as negotiating “for or on behalf of the vendor or the
purchaser,” and that agents, not principals, acted on another's behalf. JSG Trading Corp. v. Department of Agriculture, 235
F.3d 608, 616.

C.A.Fed.

C.A.Fed.2012. Quot. in diss. op. In two separate actions, owners of method patents sued alleged infringers, asserting that
defendants were liable for induced infringement of plaintiffs' patents. The district courts entered judgment for defendants.
Reversing and remanding, this court held that, while all of the steps of a claimed method had to be performed in order to
find induced infringement under the Patent Act, it was not necessary to prove that all of the steps were committed by a single
entity. A dissent argued that direct infringement was required to support infringement under the Patent Act, and properly existed
only where one party performed each and every claim limitation or was vicariously liable for the acts of others in completing
any steps of a method claim, such as when one party directed or controlled another in a principal-agent relationship. Akamai

C.A.Fed.2010. Quot. in sup., com. (c) quot. in disc., com. (f) quot. in sup. Patent holder sued competitor, alleging infringement
of its patents regarding content delivery over the Internet. The district court entered a judgment as a matter of law for defendant,
overturning a jury verdict for plaintiff. Affirming, this court held that plaintiff failed to prove infringement based on the actions
of defendant and its customers as joint parties, because there was nothing to indicate that defendant's customers were performing
any of the steps of the claimed method as agents for defendant; an essential element of agency was the principal's right to control
the agent's actions, and, here, defendant's customers decided what content, if any, they would like delivered by defendant's
service and then performed the step of “tagging” that content. Akamai Technologies, Inc. v. Limelight Networks, Inc., 629
F.3d 1311, 1319-1321.

Ct.Fed.Cl.

Ct.Fed.Cl.2011. Sec. and com. (c) quot. in sup. Civilian supervisory employee of the Department of the Army sued the United
States, alleging that the Army improperly calculated his wages while he was deployed in Iraq. Granting in part and denying in
part defendant's motion to dismiss, this court held, among other things, that plaintiff was an agent of the United States, within
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

the meaning of the court's jurisdictional statute, by virtue of his position as a federal employee. The court reasoned that the term "agent" in the statute had to be construed in light of its well-settled common law meaning, that the Restatement Third of Agency explained that the elements of common-law agency were present in the relationship between employer and employee, and that it was undisputed that plaintiff was a civilian employee of the Army. Striplin v. U.S., 100 Fed.Cl. 493, 498.

Ct.Fed.Cl.2008. Quot. in sup., subsec. (1) and com. (c) cit. in sup. Federal inmate who designed a calendar for the federal government under the auspices of a work program for inmates sued United States for infringement pursuant to the Copyright Act. Dismissing for lack of jurisdiction, this court held that plaintiff could not pursue his claim, because, while not “in the employment … of the United States,” he was “in the … service of the United States” when he prepared the calendar, and thus fell within a proviso to the controlling statute waiving government immunity; plaintiff's alleged status as an employee could not be established under the general common law of agency, because the relationship between plaintiff, an inmate at a federal correctional institution, and defendant, plaintiff’s “custodian,” was anything but consensual, and plaintiff was powerless to end his “association” with defendant. Walton v. U.S., 80 Fed.Cl. 251, 274.

U.S.Tax Ct.

U.S.Tax Ct.2012. Quot. in sup. Taxpayer, a U.S. citizen who claimed to be a partner of a Virgin Islands limited-liability company (LLC), petitioned for a redetermination of tax deficiencies assessed against him by the Internal Revenue Service (IRS), alleging, among other things, that, under the Tax Equity and Fiscal Responsibility Act (TEFRA), the IRS should have issued a notice of final partnership administrative adjustment to the LLC's tax matters partner, as opposed to issuing him a notice of deficiency. This court denied petitioner's motion to dismiss based on lack of jurisdiction, holding, inter alia, that TEFRA did not apply, because the LLC, which was classified as a foreign corporation for federal tax purposes, did not file a federal partnership return with the IRS. The court rejected taxpayer's argument that the LLC's filing of a partnership return with the Virgin Islands Bureau of Internal Revenue (BIR) constituted the filing of a federal partnership return with the IRS because the BIA was essentially an agent of the IRS under the Tax Implementation Agreement Between the United States of America and the Virgin Islands (TIA) and the BIR had forwarded copies of the LLC's partnership returns to the IRS. The court concluded that the TIA did not establish an agency relationship between the United States and the Virgin Islands or their respective tax departments, and that the BIR was not under the control of the IRS or vice versa. Huff v. C.I.R., 138 T.C. 258, 266.

D.Ariz.

D.Ariz.2013. Com. (g) quot. in sup. Seller of vision-enhancement products sued former employee and his new company, alleging, inter alia, that employee breached his common-law fiduciary duties of confidentiality and loyalty to plaintiff. Granting plaintiff's motion for entry of a default judgment against employee, this court held, among other things, that the allegations in plaintiff's complaint, taken as true on employee's default, established that employee breached his fiduciary duty of loyalty to plaintiff by soliciting plaintiff's customers for the rival business that he was forming while still employed by plaintiff, and by using plaintiff's property—including product kits, company communication resources such as email and phones, company time, and the company name—to gain access to plaintiff's clients, strengthen his relationships with them, and entice them to join his new business venture. HTS, Inc. v. Boley, 954 F.Supp.2d 927, 946.

D.Ariz.2011. Adopted in case cit. in sup., quot. in sup. Property owners who refinanced their loan and paid for lender title insurance sued title insurer for unjust enrichment, alleging that title agency through which they bought their insurance improperly charged them the basic rate, rather than the discounted refinance rate. This court granted summary judgment on liability for plaintiffs, holding that title agency was an agent of defendant for purposes of plaintiffs' transaction, and that payment to an agent was payment to the principal; because the undisputed facts showed an absence of justification for charging plaintiffs
the full basic rate, plaintiffs established that defendant was unjustly enriched. Perez v. First American Title Ins. Co., 810 F.Supp.2d 986, 992.

D.Ariz.2010. Quot. in case quot. in sup. Consumer who fell from a ladder and was injured brought negligence and products-liability claims against manufacturer of the ladder and its corporate parent. While denying parent's motion to dismiss for lack of personal jurisdiction, this court held that parent was not subject to jurisdiction as manufacturer's principal. The court reasoned that consumer failed to allege an express or implied agency agreement between parent and manufacturer; the licensing agreement between parent and manufacturer authorizing manufacturer to use parent's intellectual property regarding the ladder, without more, was insufficient to establish an agency relationship; and consumer pointed to nothing in the record indicating that parent intentionally or inadvertently induced consumer or anyone else to believe that manufacturer was its agent. Patterson v. Home Depot, USA, Inc., 684 F.Supp.2d 1170, 1180-1181.


D.Ariz.Bkrtcy.Ct.2010. Cit. in sup. Former employer of Chapter 7 debtor brought an adversary proceeding against debtor, seeking a determination that debtor's debt to employer for misappropriating employer's money or property was nondischargeable. Granting summary judgment for debtor, this court held, as a matter of first impression, that the exception to discharge for defalcation while acting in a fiduciary capacity did not include employer-employee relationships; while debtor was employer's general manager, he was never an officer, member, partner, or principal, and, while Arizona law imposed a fiduciary duty on a general manager of a company in some cases, there was no controlling precedent holding that an employer-employee relationship such as the one between the parties created a fiduciary relationship that was actionable under the bankruptcy code. In re Chavez, 430 B.R. 890, 895.

C.D.Cal.

C.D.Cal.2010. Quot. in sup., illus. 10-14 quot. in ftn. Malian children, who were allegedly forced by Ivorian farmers to labor on cocoa fields in Cote d'Ivoire, and California human rights organization that promoted social justice filed a class action against American, European, and Ivorian cocoa corporations that purchased the farmers' cocoa and assisted in its production, claiming that defendants aided and abetted violations of international norms that prohibited slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment. Granting defendants' motion to dismiss, this court held, among other things, that defendants were not directly liable as the principals of the Ivorian farmers who allegedly violated plaintiffs' human rights. The court rejected plaintiffs' argument that defendants' “long-term” and “exclusive” buyer-supplier relationship with farmers transformed an arms-length commercial relationship into an agency relationship in which the buyer was liable for the supplier's actions. Doe v. Nestle, S.A., 748 F.Supp.2d 1057, 1113.

N.D.Cal.

N.D.Cal.2009. Cit. in sup. Computer-equipment manufacturer sued numerous DRAM manufacturers, alleging that defendants engaged in a conspiracy to control DRAM production capacity and raise DRAM prices. This court denied summary judgment for one defendant and its wholly owned subsidiary, rejecting defendant's claim that it had a separate legal existence from its subsidiary and that it had not itself engaged in any direct sales of DRAM within the United States following subsidiary's incorporation in 1998. The court held that disputed issues of material fact existed as to whether subsidiary was defendant's agent such that defendant was vicariously liable for the overarching conspiracy alleged by plaintiff—more specifically, whether defendant desired that subsidiary undertake DRAM pricing on its behalf, whether subsidiary viewed its role as such, and/or
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)


D.Conn.

D.Conn. 2013. Cit. in sup. After Somali pirates seized a foreign tanker off the coast of Yemen and detained it at sea for eight months while they sought ransom and tortured the Indian sailors that staffed the tanker, two of the sailors sued, among others, tanker and British shipping company that managed a shipping pool of which the tanker was a part, asserting claims under tort and regulatory compliance theories pursuant to the Jones Act and general maritime law. This court granted defendants' motion to dismiss for lack of personal jurisdiction, rejecting plaintiffs' argument that British shipping company was the tanker's agent, and thus company's allegedly tortious actions could be attributed to tanker. The court reasoned that, even if plaintiffs established that tanker controlled British shipping company, they did not allege that tanker's control extended beyond company in Britain to encompass company's Connecticut-based affiliate office so as to establish personal jurisdiction over tanker under Connecticut's long-arm statute. Chirag v. MT MARIDA MARGUERITE SCHIFFARHRTS, 933 F.Supp.2d 349, 353.


D.Del.Bkrcty.Ct. 2013. Quot. in case quot. in sup. Trustee for the liquidating trust of Chapter 11 debtor/mortgage lender objected to a proof of claim filed by borrowers to recover damages on the basis that, among other things, debtor was responsible, under the New Jersey Consumer Fraud Act, for their injuries caused by the allegedly misleading or fraudulent acts and statements of their mortgage broker in inducing them to enter into a loan that they could not afford. Sustaining in part trustee's objection, this court held, inter alia, that debtor was not liable for broker's fraudulent acts, because broker did not act with the express or apparent authority of debtor, and thus no agency relationship existed between them. The court reasoned that there was no evidence that broker was required to submit borrowers' loan to debtor or that debtor controlled any of broker's actions, and, while borrowers asserted that they believed that broker was acting on behalf of debtor, they failed to show that debtor gave them any indication that broker could act as its agent, and thus it was not reasonable for them to believe that broker had authority to act on debtor's behalf. In re New Century TRS Holdings, Inc., 495 B.R. 625, 643-644.

D.Del.Bkrcty.Ct. 2010. Cit. in ftn. in sup. Official committee of unsecured creditors established for Chapter 11 corporate debtors filed a motion against informal committee of one debtor's bondholders, seeking an order compelling informal committee to comply with certain disclosure requirements under the bankruptcy rules applicable to any “committee representing more than one creditor.” Denying the motion, this court held, inter alia, that informal committee was not a committee representing more than one creditor within the meaning of the bankruptcy rules, because it did not represent any persons other than its members by either consent or operation of law; the plain meaning of “represent” contemplated an active appointment of an agent to assert disputed rights, and it was black letter law that a person could not establish itself as another's agent such that it bound the purported principal without that principal's consent, unless the principal ratified the agent's actions. In re Premier Intern. Holdings, Inc., 423 B.R. 58, 65.

D.Del.Bkrcty.Ct. 2000. Cit. in disc. (T.D. No. 1, 2000). Medical services provider that filed for Chapter 11 bankruptcy sued its former employees and a competitor, alleging breach of duty and tortious interference with debtor's business. This court granted in part debtor's motion for preliminary injunctive relief, holding, inter alia, that it was likely that, at final hearing, debtor would prevail on the merits against its former manager, since even without a separate agreement that prohibited working for competitors, a senior employee such as the manager had a duty of loyalty that precluded him from soliciting debtor's employees and customers on behalf of a competitor while employed by debtor. In re Integrated Health Services, Inc., 258 B.R. 96, 102.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

**D.D.C.**

D.D.C.2012. Quot. in sup. Former employees of the District of Columbia Public Schools Division of Transportation (DOT) sued the District of Columbia under the Fair Labor Standards Act (FLSA), inter alia, alleging that their DOT supervisor illegally denied them overtime hours unless they paid her kickbacks. Denying in part defendant's motion to dismiss, this court held, inter alia, that plaintiffs sufficiently alleged under D.C. law that supervisor's scheme was executed within the scope of her employment and that her actions were attributable to DOT; while plaintiff's complaint recognized that supervisor's scheme was designed to extract money, rather than to benefit DOT, the process that she followed for assigning overtime hours, corrupted as it was by kickback requirements, could fairly be said to have been undertaken on DOT's behalf and to serve DOT. Saint-Jean v. District of Columbia, 846 F.Supp.2d 247, 256.

D.D.C.2012. Cit. in sup. Commercial real estate broker brought a breach-of-contract action against limited-liability company (LLC) and its sole member, alleging that defendants failed to pay it certain commissions pursuant to a brokerage agreement. Granting in part plaintiff's motion for summary judgment, this court held that, because LLC's sole member entered into the brokerage agreement as LLC's agent, and acted within the scope of his actual authority as LLC's agent, LLC was a party to the agreement, and was legally bound by its terms. Uhar & Co., Inc. v. Jacob, 840 F.Supp.2d 287, 290.

D.D.C.2011. Com. (c) quot. in sup. Purported sub-subcontractor on a transit-authority-bridge project sued contractor for breach of a construction contract, alleging that subcontractor's principal had actual authority from contractor to hire plaintiff for dredging work. This court granted summary judgment for defendant on the ground that plaintiff breached the sub-subcontract by failing to purchase insurance; it also concluded that subcontractor's principal did not have actual authority to enter into the sub-subcontract with plaintiff. The court explained that subcontractor and its principal were explicitly prohibited from further contracting out subcontractor's responsibilities under its subcontract with contractor without first obtaining contractor's written permission, and contractor's principal asserted that he neither provided prior written permission nor otherwise consented to plaintiff's sub-subcontract purportedly signed on contractor's behalf. A-J Marine, Inc. v. Corfu Contractors, Inc., 810 F.Supp.2d 168, 176.

D.D.C.2011. Quot. in case quot. in ftn. Litigant brought claims under the Fair Credit Reporting Act (FCRA) against opposing party's attorney in underlying litigation, alleging that a process server working for attorney impermissibly accessed plaintiff's credit report. This court granted summary judgment for defendant, holding that there was no employer-employee relationship between defendant and process server, and therefore defendant was not vicariously liable for any violations of the FCRA that process server might have committed. The court pointed to defendant's uncontested evidence that he did not hire server (who was already employed by a process-serving company), he retained server for the limited purpose of obtaining plaintiff's address, he was billed by server for the services at an hourly rate, and he did not direct server how to obtain the address; further, there was no evidence that defendant, as a regular part of his business, obtained the addresses of other individuals in other litigation matters. Okeke-VonBatten v. Greater Washington Mortg. LLC, 766 F.Supp.2d 43, 47.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

D.D.C. 2010. Quot. in sup. Chapter 11 debtor initiated arbitration proceeding against creditor/public international organization, and petitioned for a subpoena summoning third party International Bank for Reconstruction and Development (IBRD) to testify at a deposition. Granting IBRD's motion to quash the subpoena, this court held that it lacked subject-matter jurisdiction over this discovery dispute; creditor was not acting as an agent of IBRD when creditor waived its own immunity in the bankruptcy proceeding by filing a proof of claim, and thus creditor's waiver of immunity was not imputed to IBRD. The court reasoned that IBRD did not exercise the requisite amount of control over creditor to establish agency; the fact that creditor was a subsidiary or affiliate of IBRD was not sufficient to create a principal-agent relationship. In re Kaiser Group Intern., Inc., 730 F.Supp.2d 247, 251.

D.D.C. 2010. Quot. in sup. Estate and family members of an American citizen killed in a suicide bombing in a restaurant in Tel Aviv, Israel, sued Chinese bank under the Anti-terrorism Act, alleging that defendant intentionally and knowingly provided financial services to an agent of the terrorist organization that carried out the bombing. Denying defendant's motion to dismiss, this court held that plaintiff adequately pled intentional misconduct on the part of defendant by alleging that its provision of financial services to the terrorist organization's agent constituted the provision of financial services to organization as principal, and that China had been informed by Israel of the nature of the wire transfers to and from the agent's account. Wultz v. Islamic Republic of Iran, 755 F.Supp.2d 1, 50.

D.D.C. 2008. Quot. in ftn. Local counsel that was hired by law firm to represent law firm's client, a limited-liability company, in an underlying action sued, among others, two former members of client, seeking to hold them jointly and severally liable for client's unpaid legal fees under theories of quantum meruit and unjust enrichment. Dismissing plaintiff's quantum meruit claim, this court held that plaintiff did not have a reasonable expectation of payment from members; while members were named as defendants along with client in the underlying action, plaintiff failed to show that it was authorized to represent members in that action, or that members manifested the requisite assent or consent to have plaintiff represent them or act as their agents in that action. Flemming, Zulack and Williamson, LLP v. Dunbar, 549 F.Supp.2d 98, 108.

D.D.C. 2008. Cit. in ftn. Relator brought qui tam action under the False Claims Act against various corporations and their principals, alleging that they colluded to secure and overcharge on certain government contracts. After a jury found in favor of plaintiff and awarded the government damages, this court denied one corporate defendant's motion for judgment as a matter of law, holding, inter alia, that plaintiff presented sufficient evidence of the moving defendant's liability based on the actions of another defendant's agent. While the agent lacked actual authority on behalf of the moving defendant, plaintiff introduced evidence that the agent had apparent authority, noting that the moving defendant had allowed the agent to hire employees on its behalf and maintain an office at its headquarters, and had designated him as a signatory on its bank account. Miller v. Holzmann, 563 F.Supp.2d 54, 122.

D.D.C. 2006. Quot. in sup. Law firm that suffered multiple e-mail server attacks that originated from internet protocol addresses registered to company brought federal statutory claims against company and an unidentified “John Doe” defendant, in his purported capacity as company's employee or agent, for allegedly carrying out the attacks. This court, inter alia, dismissed plaintiff's claims against company, holding, inter alia, that plaintiff failed to aduce any facts showing intentional conduct by company, a requirement of all three statutes relied upon by plaintiff. The court noted that the only hint in plaintiff's complaint of an affirmative allegation that company itself initiated or authorized the attacks, namely, that John Doe was acting as company's agent, was similarly unsupported. Butera & Andrews v. International Business Machines Corp., 456 F.Supp.2d 104, 111.

M.D.Fla.

M.D.Fla. 2010. Quot. in sup. Shipyard employee sued the United States, alleging that he was injured while performing contract repair work for a steel renewal project aboard a vessel owned by defendant. After a bench trial, this court found in favor of
defendant, holding, among other things, that the conduct of the project's port engineer, who had been retained by defendant's managing agent for the vessel, was not attributable to defendant. The court reasoned, in part, that, even assuming that port engineer was an agent of defendant's managing agent, he was not a subagent of defendant, because managing agent did not have either actual or apparent authority to appoint him as a subagent; plaintiff produced no evidence that defendant authorized managing agent to delegate its responsibilities or that defendant authorized port engineer to act on its behalf. Green v. U.S., 700 F.Supp.2d 1280, 1301.

M.D.Fla.2010. Cit. in sup., com. (g) quot. in sup. Wheelchair-using resident of recreational vehicle resort sued resort's owner under federal statutes, claiming that defendant discriminated against her based on her sex and her handicap, after an unincorporated neighborhood association formed by the resort's residents allegedly refused to let her participate in a men's billiards tournament and required her to sit at a separate table at bingo night. Granting in part defendant's motion for summary judgment, this court held that association was not defendant's agent, because neither association nor defendant manifested assent to an agency relationship, and, although defendant advertised association's events, defendant did not schedule, organize, or otherwise control the events. The court noted that the mere fact that the events benefited defendant's property failed to create an agency relationship, as mutual benefit alone was insufficient. Haynes v. Wilder Corp. of Delaware, 721 F.Supp.2d 1218, 1225.

S.D.Fla.

S.D.Fla.2013. Cit. in case quot. in sup. Federal Deposit Insurance Corporation, as receiver for a failed bank, sued title insurer that served as closing agent on five mortgage loans made by bank, asserting, inter alia, a claim for breach of fiduciary duty. Denying defendant's motion for summary judgment, this court held that a genuine issue of material fact existed as to whether defendant breached the fiduciary duty that it owed to bank as bank's closing agent. The court noted that the evidence, if true, showed that defendant failed, at a minimum, to disclose that the loan transactions were not negotiated at arm's length. F.D.I.C. v. Floridian Title Group Inc., 972 F.Supp.2d 1289, 1297.

S.D.Fla.2013. Cit. in sup., quot. in case quot. in sup. Golf-equipment store that purportedly received an unsolicited faxed advertisement for a dental practice brought a putative class-action suit against dental practice, alleging, inter alia, violations of the Federal Telephone Consumer Protection Act (TCPA). Granting summary judgment for defendant, this court held that plaintiff failed to prove that defendant was vicariously liable under the TCPA on a theory of formal agency for a third-party marketer's alleged transmission of the fax, because plaintiff could not demonstrate that defendant controlled the content of the fax. The court noted that, pursuant to Restatement Third of Agency § 1.01, formal agency liability required a showing that a principal manifested assent to an agent that the agent acted on behalf of the principal and subject to the principal's control. Palm Beach Golf Center-Boca, Inc. v. Sarris, 981 F.Supp.2d 1239, 1249, 1251.

S.D.Fla.2007. Com. (b) quot. in ftn. After Colombian airline's passenger aircraft crashed en route from Panama to Martinique, killing all passengers aboard, plaintiffs, who, like decedents, were residents of Martinique, sued Florida corporation that chartered the aircraft and crew. This court, finding that corporation was a “contracting carrier” pursuant to the Montreal Convention, ordered the parties to brief the issue of whether the cases should be dismissed on the ground of forum non conveniens, which was applicable pursuant to the Convention. The court rejected defendant's contention that it could not be a “principal” under the Convention because it merely assigned the aircraft's seating capacity to a Martinique travel agency, and thus there was no corresponding “agent”; the term “principal” under the Convention did not contemplate the necessity of an agency relationship but was specifically used to clarify that those acting solely as agents could not qualify as contracting carriers. In re West Caribbean Airways, S.A., 619 F.Supp.2d 1299, 1307.

N.D.Ill.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

N.D.Ill.2013. Quot. in sup. Borrower's brother brought a putative class action against lender and debt collector, alleging that debt collector violated the Telephone Consumer Protection Act by using an automatic dialer to call his cell phone multiple times without his consent in an attempt to collect borrower's debt to lender. Lender moved to stay this action while it petitioned the Federal Communications Commission (FCC) for guidance as to whether it was vicariously liable for debt collector's actions under FCC regulations. Denying lender's motion to stay, this court held that lender failed to present any evidence that a stay would materially affect this case, since FCC regulations held a principal liable for calls placed by its agent, and debt collector appeared to have acted as lender's agent under principles of federal agency law. The court pointed out that lender did not dispute, and thus conceded, that it received the benefit of the calls placed by debt collector, as it received the money (or a percentage thereof) obtained in connection with those calls. Jamison v. First Credit Services, Inc., 290 F.R.D. 92, 100.

N.D.Ill.2006. Quot. in sup., com. (c) cit. in sup. Consumer who defaulted on a debt filed a putative class action against creditor and debt collector, alleging that debt collector sent him two debt-collection letters in violation of the Fair Debt Collection Practices Act (FDCPA). Denying creditor's motion for summary judgment, this court held that, while it was undisputed that creditor did not draft, print, or mail the letters at issue, creditor could be held vicariously liable for debt collector's FDCPA violations based on a principal-agent relationship. The court pointed out that, under the contract between creditor and debt collector, creditor retained ownership of the debts and the ability to recall them from debt collector, and thus had a right to control the contents of the letters sent by debt collector and otherwise control debt collector's activities. Schutz v. Arrow Financial Services, LLC, 465 F.Supp.2d 872, 877.

N.D.Ill.2005. Quot. in sup., com. (c) quot. in ftn. (T.D. No. 2, 2001). Debtor sued purchaser of defaulted credit-card debt and its collection contractor for alleged violation of the Fair Debt Collection Practices Act (FDCPA). Granting purchaser's motion for summary judgment, this court held, inter alia, that purchaser was not vicariously liable for contractor's dunning letter because contractor was not purchaser's agent under traditional agency principles; purchaser did not control contractor's drafting of the letter or other routine interactions with debtors, and, although an independent contractor could be an agent, here, no such agency relationship arose. Scally v. Hilco Receivables, LLC, 392 F.Supp.2d 1036, 1040, 1041.

N.D.Ill.2001. Cit. in disc. (T.D. No. 1, 2000). Corporation that developed interactive video games sued Illinois shareholder for breach of contract after shareholder failed to provide corporation with capital for business ventures as agreed. Parties filed motions and cross-motions for summary judgment. The court denied shareholder's motion in part, holding, inter alia, that: corporation could recover compensatory damages upon proof that shareholder breached agreement; evidence existed from which a jury could determine that shareholder had apparent authority to enter into contract with corporation; shareholder could reasonably have believed that he had actual authority to enter agreement with corporation; the parties' actions could be examined to clarify ambiguities in the contract; and corporation's fiduciary-duty claim could be the basis for punitive damages. Kinesoft Development Corporation v. Softbank Holdings, Inc., 139 F.Supp.2d 869, 899.


N.D.Ill.Bkrtcy.Ct.2014. Com. (c) quot. in sup. After creditors filed their petition for an involuntary Chapter 7 bankruptcy against alleged debtor/real-estate developer, debtor filed an answer objecting to creditors' standing. After trial was held, this court overruled debtor's objections, holding that creditors were entitled to bring an involuntary petition against it. In making this decision, the court concluded that certain creditors that were owed payment by debtor through an independent contractor that provided particular administrative services for it pursuant to a management agreement did not qualify as petitioning creditors. Referring to Restatement Third of Agency § 1.01 Comment c, the court noted that the delegation of specific tasks, together with a provision disclaiming agency, generally led to the conclusion that there was no actual authority, and, without an agency
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

relationship, the existence of an internal agreement for reimbursement did not make contractor's creditors into debtor's creditors. In re 35th & Morgan Development Corp., 510 B.R. 832, 853.

N.D.Ill.Bkrtcy.Ct. 2011. Cit. in sup. Chapter 7 debtor's sister, in her purported capacities as successor trustee and successor beneficiary of revocable trust, brought an adversary proceeding against bankruptcy trustee and debtor, as former trustee of the trust, seeking a declaratory judgment that the assets being held by bankruptcy trustee were not property of the bankruptcy estate, and that she was the legal and equitable owner of the assets pursuant to a trust amendment. Dismissing with prejudice this portion of plaintiff's adversary complaint, this court held that, because plaintiff allowed debtor to act as her agent and claim ownership of the assets when it suited her interests in prior litigation, and because she, like debtor, refused to cooperate in discovery related to the trust, she would not be permitted to claim that she or the trust owned the assets. The court noted that principals were bound by their agent's authorized conduct. In re Sharif, 457 B.R. 702, 728.

E.D.Ky.

E.D.Ky. 2013. Cit. in case cit. in sup. Kentucky corporation, its wholly owned Chinese subsidiary, and others sued bank, alleging, inter alia, that bank breached its fiduciary duty when it failed to wire funds to subsidiary as required by a document executed by corporation and bank. Granting summary judgment for defendant as to this claim, this court held that plaintiffs failed to demonstrate a fiduciary relationship with defendant, or any other relationship giving rise to legal liability. The court rejected plaintiffs' argument that, by signing the document, defendant undertook a duty to plaintiffs, and thereby became plaintiffs' agent, pointing out that an agency relationship only existed where the agent consented to the principal's control, and here there was no evidence that defendant consented to plaintiffs' control. Guangzhou Consortium Display Product Co., Ltd. v. PNC Bank, Nat. Ass'n, 956 F.Supp.2d 769, 782.

E.D.La.

E.D.La. 2007. Quot. in sup., com. (g) quot. in ftn. Chapter 7 debtor who was defrauded by his partner sued the IRS, seeking a determination that certain income-tax liabilities that he owed with regard to the partnership were discharged under the Bankruptcy Code. On remand, the bankruptcy court ruled, in part, that the IRS was barred from collecting some of the taxes for which partner had signed statute-of-limitations extensions on behalf of the partnership. Affirming, this court held that partner's authority to sign the extensions was extinguished, because he negotiated them under a disabling conflict of interest of which the IRS had knowledge. The court noted that, while debtor had manifested his empowerment of partner to act as agent for the partnership, the IRS was only entitled to rely on partner's actions insofar as that reliance was based on the reasonable belief that partner had the authority to bind the partnership. U.S. v. Martinez, 382 B.R. 285, 297.

D.Mass.

D.Mass. 2009. Quot. in sup. Investment firm's clients who were defrauded by firm's principal through a Ponzi scheme sued firm's bank, alleging, inter alia, that bank aided and abetted principal's breaches of fiduciary duties to the investor-clients. This court reserved ruling on clients' motion for summary judgment until after bank filed a motion for summary judgment, holding, inter alia, that a genuine issue of material fact remained as to whether bank had actual knowledge of principal's breach of fiduciary duties owed to the clients, i.e., knew that principal was a fiduciary to firm, and knew that principal's actions constituted a breach of his duties. The court noted that at least one of bank's employees arguably knew that principal was a fiduciary with respect to funds in the account through which principal conducted the fraud, and that principal was commingling firm's funds with clients' funds in that account. Fine v. Sovereign Bank, 634 F.Supp.2d 126, 137.
Echeverri, Daniel 9/22/2015
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E.D.Mich.

E.D.Mich. 2012. Quot. in sup., cit. in ftn. Former graduate student of social work at state university brought claims under Title IX and Michigan's Elliott-Larsen Civil Rights Act (ELCRA) against university, adult rehabilitation center where she was placed by university to perform a required field internship, and others, alleging that she was unlawfully dismissed from university's graduate program because she was unwed and pregnant. Granting summary judgment for rehabilitation center, this court held, inter alia, that plaintiff's ELCRA claim against center failed, because, while ELCRA expressly prohibited agents of educational institutions from discriminating based on sex, pregnancy, and marital status, plaintiff could not establish that center was an agent of university for purposes of ELCRA. The court reasoned that plaintiff failed to prove that center could, or did, act on behalf of university; that it owed university any duty, much less a fiduciary duty; or that university controlled the conduct of plaintiff's field instructor or others at the center through university's employees. Varlesi v. Wayne State University, 909 F.Supp.2d 827, 841, 856.

E.D.Mich. 2009. Com. (a) quot. in ftn. Retired union employees and their spouses filed a class action against former employer, asserting, among other things, that they were not bound by an agreement between defendant and union that purportedly relieved defendant of any future liability for plaintiffs' vested health insurance benefits. Denying summary judgment for defendant, this court held, inter alia, that union was not acting as plaintiffs' agent. The court noted that two of the essential elements of agency were absent in the relationship between a union and its retired employees—the principal's right to control the agent and the agent's fiduciary duty to the principal; while plaintiffs could remain involved in union activities and could "influence" union, they lacked the power to "control" union. Yolton v. El Paso Tennessee Pipeline Co., 668 F.Supp.2d 1023, 1034.

D.Minn.

D.Minn. 2012. Cit. in ftn. Insured under general liability insurance policies brought, inter alia, claims for breach of contract, equitable reapportionment, and bad faith against insurer's parent, alleging that parent was vicariously liable for insurer's conduct in misallocating insured's asbestos claims to a category with an aggregate limit and thereby prematurely exhausting insured's coverage under the insurance policies. Granting summary judgment for parent, this court held that parent was not vicariously liable for insurer's alleged torts, because plaintiff failed to demonstrate either that parent and insurer consented to an agency relationship or that parent had the right to control insurer's handling of insured's claims, the alleged source of insured's injury. A.P.I., Inc. Asbestos Settlement Trust v. Home Ins. Co., 877 F.Supp.2d 709, 725.

D.Minn. 2008. Com. (c) quot. in sup. Owner of patent for stent-cutting machines sued competitor, asserting theft of trade secrets, unfair competition, and other claims. Granting in part defendant's motion for summary judgment, this court held that no reasonable jury could find that defendant had access to plaintiff's trade secrets through defendant's sales representative, who for a time was also a sales representative for plaintiff. Noting that it was undisputed that the sales representative was an independent contractor hired by defendant, not defendant's employee, the court reasoned that, although independent contractors could, under some circumstances, be deemed agents of their contracting partners, plaintiff did not argue that the sales representative was defendant's agent; thus, the knowledge of the sales representative as a nonagent independent contractor could not be imputed to defendant. Spectralytics, Inc. v. Cordis Corp., 576 F.Supp.2d 1030, 1060.

D.N.J.Bkrtcy.Ct.

D.N.J.Bkrtcy.Ct. 2014. Com. (c) quot. in case quot. in sup. Reorganized debtor requested reconsideration of the allowed claim of purchaser of a tax-sale certificate on property owned by debtor, seeking an order forfeiting the tax-sale certificate pursuant to the New Jersey Forfeiture Statute, and voiding purchaser's lien on the property. Sustaining debtor's objection to
purchaser's claim, this court held that the tax-sale certificate was subject to forfeiture, and purchaser's lien was void, because purchaser knowingly charged debtor excessive and improper amounts, by way of purchaser's proofs of claim, in connection with debtor's redemption in its bankruptcy case of the tax-sale certificate. The court found that debtor adequately demonstrated that purchaser's agents knowingly charged debtor excessive and improper amounts, and thus purchaser could be imputed with the knowledge of those agents (in this case, purchaser's employees). In re Princeton Office Park, L.P., 504 B.R. 382, 396.

S.D.N.Y.

S.D.N.Y.2014. Com. (g) quot. in sup. Trustee for the liquidation of broker-dealer filed a motion seeking approval of his decision to deny “customer status” under the Securities Investor Protection Act (SIPA) to certain banks with respect to their long-term repurchase agreements with broker-dealer. The bankruptcy court affirmed trustee's determination. Affirming, this court held, inter alia, that banks failed to establish the indicia of a fiduciary relationship necessary to prove entrustment and thereby to acquire customer status under SIPA. The court explained that, while banks emphasized certain rights that they had with respect to the securities that they delivered to broker-dealer, such as the right to return of the securities at any time and the right to demand return of the exact same securities, these were contractual rights, which did not create a fiduciary relationship. In re Lehman Bros. Inc., 506 B.R. 346, 356.

S.D.N.Y.2013. Quot. in sup. Wholesaler of over-the-counter healthcare products brought a breach-of-contract action, inter alia, against manufacturer that sold it certain products, after producer of the active ingredient contained in the products initiated a voluntary recall due to possible microbial contamination; manufacturer asserted third-party claims against producer, seeking common-law indemnification on the theory that manufacturer acted as producer's agent in conducting the recall. Granting producer's motion to dismiss the third-party complaint, this court held that manufacturer failed to state a claim for common-law indemnification. The court reasoned that manufacturer failed to allege that it was subject to producer's control in conducting the recall; rather, it merely alleged that producer requested that manufacturer recall the products at issue, and manufacturer complied. These allegations were insufficient to establish an agency relationship between the two parties such that manufacturer could state a claim for indemnification. Prestige Brands Inc. v. Guardian Drug Co., 951 F.Supp.2d 441, 448.

S.D.N.Y.2011. Com. (f)(2) quot. in case quot. in ftn. Institutional investors sued, among others, successor-in-interest to corporate parent of corporation spun off in an initial public offering (IPO), alleging that defendant was liable for false and misleading statements made about spun-off corporation's environmental-remediation reserves during and following the IPO. This court denied defendant's motion to dismiss plaintiffs' claim that defendant was liable on the basis of respondeat superior for former parent corporation's primary violation in controlling the reporting of spun-off corporation's reserves. The court found sufficient plaintiffs' allegation that former parent corporation possessed either actual or apparent authority to act on behalf of defendant, specifically that defendant consented to parent corporation's acting on its behalf in implementing the terms of the master separation agreement between parent and spun-off corporation, and that defendant controlled and directed parent corporation's actions in so doing. In re Tronox, Inc. Securities Litigation, 769 F.Supp.2d 202, 209.

S.D.N.Y.2009. Com. (c) quot. in ftn. Extraordinary commissioner of collapsed Italian dairy conglomerate, along with conglomerate's wholly owned subsidiary, brought suit for damages against accountants, banks, and others that allegedly assisted conglomerate's insiders in perpetrating a massive fraud involving the understatement of conglomerate's debt and the overstatement of its net assets. Granting summary judgment for defendants, this court held that plaintiffs' claims were barred by the doctrine of in pari delicto, which foreclosed recovery by a claimant that was a participant in the alleged wrong; because conglomerate's corrupt insiders were acting within the scope of their employment when they worked with defendants to defraud debtor, their actions and knowledge could be imputed to plaintiffs. The court noted that corporations could act only through their agents, including their employees and officers. In re Parmalat Securities Litigation, 659 F.Supp.2d 504, 517.
S.D.N.Y. 2009. Com. (f)(2) quot. in sup. and cit. in ftn. Black South African citizens brought class actions against multinational automotive, computer hardware and software, banking, and armaments corporations under the Alien Tort Claims Act, alleging that defendants violated customary international law by committing, under direct, aiding and abetting, and/or conspiracy theories, apartheid, extrajudicial killing, torture, and other acts. Denying in part defendants’ motion to dismiss and denying defendants’ motion for reconsideration, this court rejected defendants’ arguments that they could not be held liable for the actions alleged in the complaints because those acts were properly attributed to their subsidiaries, indirect subsidiaries, or affiliates; while a parent corporation was not liable for the acts of its subsidiaries simply because it owned the subsidiary's stock, plaintiffs made substantial allegations to support liability against defendants under agency theories. In re South African Apartheid Litigation, 617 F.Supp.2d 228, 272, 298. See case below.

S.D.N.Y. 2009. Reporter's Note to com. (f)(2) quot. in sup. and cit. in ftn. (erron. cit. as com. (f)(2)). South African citizens filed class actions against subsidiary corporation and its parent corporation under the Alien Tort Claims Act, alleging that defendants aided and abetted torts in violation of customary international law by supplying the South African government with computers used to implement South Africa's racial pass laws, a crucial component of apartheid. Granting parent's motion to dismiss, this court held, inter alia, that plaintiffs failed to allege facts in support of its claim that subsidiary acted as parent's agent. The court noted that the relevant relationship between subsidiary and the South African government predated the relationship between subsidiary and parent, and concluded that plaintiffs’ otherwise unsupported assertion that parent's management played “an increasing role in directing subsidiary's business activities” did not suffice to sustain a plausible claim that subsidiary acted as parent's agent in carrying out sales, particularly concerning a preexisting customer relationship. In re South African Apartheid Litigation, 633 F.Supp.2d 117, 121. See case above.

S.D.N.Y. 2007. Com. (d) cit. in disc. Diesel-oil buyer that issued a letter of credit to oil company's broker sued seller and oil company, alleging that oil company initiated a draw-down on the letter of credit after buyer had already paid seller the full amount due for the oil under an amendment to the contract of sale between buyer and seller that decreased the funds that oil company was to receive. Denying buyer's motion to confirm an ex parte order of attachment on funds held by the clerk of the court, this court held, among other things, that plaintiff failed to prove that seller was oil company's agent and was acting with apparent authority on behalf of oil company; the court rejected buyer's claim that oil company's alleged status as third-party beneficiary to the original and amended contracts established its awareness of them and seller's role as its agent in making them. Musket Corp. v. PDVSA Petroleo, S.A., 512 F.Supp.2d 155, 161.

E.D.Pa.

E.D.Pa. 2013. Quot. in sup. Insurer filed a subrogation complaint against insured's neighbors, alleging that their negligence caused a fire that damaged insured's property; neighbors moved for summary judgment, and insurer, in opposing the motion, asserted that it was entitled to an adverse inference on the fire's causation based on a "vicarious spoliation" theory, because neighbors' insurer acted as neighbors' agent in gutting neighbors' property and failing to preserve evidence. Granting defendants' motion for summary judgment, this court held, among other things, that plaintiff failed to point to any evidence that could lead a reasonable factfinder to conclude that defendants' insurer was defendants' agent at the time the fire scene was allegedly spoliated, but, rather, relied merely on defendants' and insurers' assent to be bound by certain contractual duties in their insurance contract. The court explained that this argument overlooked the well-established principle that first-party insurance claims were adversarial proceedings between an insurer and its insured. Here, defendants' insurer acted on its own behalf to determine whether a covered loss existed for which it would owe defendants a duty to defend and/or indemnify, and defendants had no control over their insurer's actions. State Farm Fire & Cas. Co. v. Steffen, 948 F.Supp.2d 434, 448.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

E.D.Pa. 2010. Com. (c) quot. in sup. Employee of tax-preparation franchisee brought civil-rights action against supervisors, franchisee, and franchisor, alleging that supervisors sexually harassed, assaulted, and threatened her during her employment. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff alleged sufficient facts to raise a plausible claim that she was an employee of franchisor for purposes of federal and state employment laws. The court reasoned, in part, that plaintiff might be able to show that franchisor authorized or ratified franchisee's alleged representations to her that franchisor was her sole or joint employer. The court rejected franchisor's argument that plaintiff could not have reasonably believed that franchisee and franchisor were the same entity; because the separate legal existence of the principal and agent was inherent in any common-law agency relationship, a third party's knowledge that an apparent agent was distinct from the principal could not render unreasonable that party's belief that the apparent agent had authority to act on the principal's behalf. Myers v. Garfield & Johnson Enterprises, Inc., 679 F.Supp.2d 598, 614.

E.D.Pa. 2007. Cit. in sup. Stock exchange's former seat owners, who, after demutualization of the stock exchange into a private stock corporation, became shareholders in the corporation, brought a securities-fraud class action against members of stock exchange's board of governors and institutional investors, alleging that their ownership interests were diluted as a result of defendants' fraud. Granting defendants' motions to dismiss, this court held that plaintiffs' claim under the securities laws for rescission of the contract consisting of the demutualization transaction and related deals with the investors failed as a matter of law because plaintiffs did not adequately plead privity with the board. The court reasoned that evidence of board chairman's informal memos, which promised a vote on equity rights, was insufficient to show that plaintiffs controlled the board so as to establish an agency relationship providing the requisite privity. McGowan Investors LP v. Frucher, 481 F.Supp.2d 405, 412.

M.D.Pa. 2014. Quot. in sup. After wife of a nursing-home resident who died after allegedly suffering a deep-tissue injury that deteriorated into necrotizing fasciitis sued nursing home in state court, nursing home filed a federal action seeking to stay the state-court proceedings and to compel wife to arbitrate pursuant to the arbitration agreement that she signed on resident's behalf upon his admission. This court granted nursing home's motion to compel arbitration as to wife's survival-action claims only, holding, inter alia, that the arbitration agreement was properly executed when it was signed by wife, rather than resident, because there was sufficient evidence to establish that wife had express authority from resident to sign the agreement on his behalf, pursuant to the agency principles set forth in Restatement Third of Agency § 1.01. The court pointed to undisputed evidence that resident was blind but had no mental infirmities, that he requested that wife sign the arbitration agreement for him, that wife had the opportunity to read and review the documents related to resident's admission and signed all such documents, that resident was present throughout the entire process, and that he took no further action after wife signed the documents. Northern Health Facilities v. Batz, 993 F.Supp.2d 485, 489.

M.D.Pa. 2009. Cit. in case quot. in sup. African-American family brought racial-discrimination and other claims against hotel and its front desk clerk after clerk denied father's request for a room for himself, his fiancée, and their minor daughter. Denying summary judgment for defendants, this court held, inter alia, that questions of fact remained as to whether fiancée and daughter had standing to assert a discrimination claim in light of plaintiffs' allegations that father was acting as their agent and attempted to enter into a contract with defendants for a room on their behalf. The court noted that individuals, including minors, had the capacity to act as principal in an agency relationship if, at the time the agent took action, the individual would have had capacity if acting in person, and that the appointment of an agent by a minor was not void, but merely voidable. Shumate v. Twin Tier Hospitality, LLC, 655 F.Supp.2d 521, 531.

D.S.D.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

D.S.D. 2013. Quot. in ftn. After owners of Section 8 housing sued the South Dakota Housing Authority (SDHA) for breach of their housing-assistance-payments contracts, SDHA brought a third-party complaint against the U.S. Department of Housing and Urban Development (HUD), alleging, inter alia, that it was entitled to indemnification as HUD's agent in defending the action by plaintiffs. Granting HUD's motion for partial dismissal and judgment on the pleadings, this court held, among other things, that SDHA was not an agent of HUD. The court reasoned that SDHA was created and governed by state law, it was an independent public instrumentality exercising essential public functions, and it was not under federal control in exercising many of its powers. Cathedral Square Partners Ltd. Partnership v. South Dakota Housing Development Authority, 966 F.Supp.2d 862, 872-873.

S.D.Tex.

S.D.Tex. 2009. Com. (f) cit. and quot. in sup. Provider of pharmacy-care services sued hospitals, seeking to recover payments for services rendered under the parties' pharmacy agreements. Granting summary judgment for provider on hospitals' counterclaim for breach of fiduciary duty, this court held, inter alia, that provider did not owe hospitals a general fiduciary duty because the agreements did not create an agency relationship between the parties. The court reasoned that provider did not perform its contractual obligations subject to hospitals' right to control, because the agreements delegated control of the means and details of the provisions of pharmacy services to provider, and no agency relationship could exist without such a right of control. Cardinal Health Solutions, Inc. v. Valley Baptist Medical Center, 643 F.Supp.2d 883, 887-889.


S.D.Tex.Bkrtcy.Ct. 2012. Quot. in sup. Chapter 13 debtor, who had used a loan broker to assist her in obtaining a loan, objected to lender's proof of claim, arguing that lender and loan broker were not truly independent entities, and that lender therefore was liable for broker's violations of the Texas Credit Services Organization (CSO) Act. This court disallowed lender's claim. The court concluded, however, that, although lender acted as broker's agent in drafting broker's credit services agreement with debtor and thus was liable for false and misleading representations included in that agreement in violation of the CSO Act, debtor was not entitled to have the claim disallowed on the basis of lender's violations of the Act, since she was not aware of lender's misrepresentations and thus could not demonstrate that she was injured by them. In re Grayson, 488 B.R. 579, 589.

W.D.Tex.

W.D.Tex. 2009. Com. (c) quot. in sup. Female police officer sued prospective employer, claiming that employer decided not to hire her as an advisor to instructors at an all-female police academy in Afghanistan after a doctor who worked for a contractor of employer allegedly unlawfully discriminated against her by improperly considering her gender when deciding to give her a failing score on a psychological evaluation. Denying summary judgment for employer, this court rejected employer's argument that it could not be liable for relying on the opinion of an independent professional when making its hiring decisions, holding, inter alia, that doctor and contractor were employer's agents for purposes of determining whether plaintiff was psychologically suited to perform her mission in Afghanistan. Jimenez v. DynCorp Intern., LLC, 635 F.Supp.2d 592, 601.

E.D.Va.

E.D.Va. 2013. Quot. in sup. Mortgage insurer, as assignee of property owner's rights, brought a claim for, inter alia, breach of fiduciary duty against owner's insurance broker and agency for allegedly failing to follow owner's instruction to place property insurance on the property, seeking to recover the amount it paid to mortgage lender after the property was destroyed in a fire. Denying defendants' motion to dismiss, this court held that plaintiff sufficiently pled an action for breach of fiduciary duty.
against defendants. The court reasoned that broker, along with insurance agency, owed certain fiduciary duties common to all broker-client relationships, and plaintiff alleged that defendants breached their fiduciary duty by failing to place insurance on the property before the previous insurance policy lapsed prior to the fire; moreover, although defendants were correct that the alleged breach did not cause the fire itself, it was certainly the cause of property owner's damages. Cincinnati Ins. Co. v. Ruch, 940 F.Supp.2d 338, 347.

E.D.Va. 2013. Quot. in sup. South Korean corporate defendant moved to quash service of process and to dismiss an indictment charging it and five of its officers and employees with violations of federal trade-secret statutes and obstruction of justice. Granting in part defendant's motion to quash service, this court held, inter alia, that the government failed to prove that service of process on defendant's wholly owned New Jersey subsidiary was effective service on defendant under the theory that subsidiary was defendant's managing or general agent, because the government did not present sufficient facts to show that subsidiary had authority (or acted as if it had authority) to take actions with legal consequences for defendant. While subsidiary sold defendant's products to American and Canadian customers, it did so by binding itself, and not defendant, to contracts, and then purchasing the products from defendant and distributing them to the customers. U.S. v. Kolon Industries, Inc., 926 F.Supp.2d 794, 810.

W.D.Wash.

W.D.Wash. 2007. Quot. in case quot. in disc. (T.D. No. 1, 2000). Insured freight corporation under a cargo legal liability insurance policy sued insurer, seeking indemnification for its settlement of two lawsuits against it by customers asserting claims for lost or damaged shipments. On remand, this court granted summary judgment for insurer, holding that, because the facts were insufficient to establish an agency relationship between insured and the United States Postal Service (USPS), with which insured had contracted to make final delivery to consignees, insured was not liable to the customers for the losses at issue, which had occurred after insured had delivered the packages to the USPS; thus, insurer was not obligated to provide coverage under the policy. The court found that an agency relationship was lacking because insured did not control the relevant manner of performance by the USPS. Airborne Freight Corp. v. St. Paul Fire & Marine Ins. Co., 491 F.Supp.2d 989, 996.


W.D.Wash.Bkrtcy.Ct. 2014. Quot. in sup. Following debtor's prepetition default on her mortgage loan and the subsequent execution and recording of a notice of trustee's sale, debtor brought an adversary proceeding against mortgage lender, loan servicer, and document custodian, alleging violations of the Washington Deed of Trust Act (Act). Granting defendants' motion for summary judgment, this court held, inter alia, that defendants did not act without lawful authority or materially violate the Act. The court concluded that document custodian was loan servicer's agent for purposes of physically possessing the promissory note, and thus servicer was a “holder” and “beneficiary” of the note for purposes of the Act. Citing Restatement Third of Agency § 1.01, the court reasoned that servicer exercised significant control over the details of document custodian's work, both parties assented to the principal–agent relationship, and servicer also directly controlled document custodian with regard to possession of the note. In re Butler, 512 B.R. 643, 654.

Ariz.

Ariz. 2009. Quot. in sup. Prospective buyer sued seller, seeking specific performance of a contract for the purchase and sale of 20 acres of land. The trial court denied buyer's request for specific performance, finding that buyer's agent had acted inequitably by, among other things, using his own money rather than buyer's to provide the earnest-money deposit required under the contract, and then lying about it. The court of appeals reversed. Vacating and affirming the trial court, this court held that agent's inequitable acts could be imputed to buyer whether or not buyer knew of agent’s misconduct. The court reasoned that, under
ordinary principles of agency law, an agent's acts bound the agent's principal, and principals were not entitled to benefit from the inequitable conduct of their agents. Queiroz v. Harvey, 220 Ariz. 273, 205 P.3d 1120, 1122.

_Ariz._2007. Coms. (b) and (c) cit. in disc. Homeowner's insurer, as subrogee, brought a strict-products-liability action against seller of water-filtration system and manufacturer of allegedly defective canister component. The trial court entered a default judgment against manufacturer, and denied insurer's motion for partial summary judgment asserting that defendants were jointly and severally liable; the court of appeals affirmed. Affirming, this court held that the legislative abolition of joint and several liability in 1987 extended to strict-products-liability actions. The court rejected insurer's argument that a statutory exception to several-only liability based on an agency relationship between defendants applied in this case; not only did the mere purchase of a product from a supplier not establish an agency relationship between buyer and seller, but also such a relationship could not be imputed here because the various participants in the chain of distribution were liable only for their own actions in distributing the defective product. State Farm Ins. Companies v. Premier Manufactured Systems, Inc., 217 Ariz. 222, 172 P.3d 410, 414.

_Ariz.App._

_Ariz.App._2013. Com. (c) quot. in sup. Defendant was convicted in trial court of sexual abuse and sexual conduct with a minor based on acts he had committed against his 15-year-old stepdaughter. On remand, this court affirmed, holding, inter alia, that the trial court did not abuse its discretion in denying defendant's motion to suppress his statements to police. The court rejected defendant's argument that a police detective enlisted defendant's wife as an agent of the state in an effort to elicit the statements from defendant, despite his invocation of the right to counsel several days earlier. The court reasoned that wife initiated the contact with the detective, and only then did the detective suggest that defendant voluntarily submit to a polygraph test; that the detective neither ordered nor coerced wife to relay any information to defendant; and that the detective offered wife no reward apart from the possibility of closing the investigation, which, if defendant were innocent and if stepdaughter's recantation were true, would have been in her own family's interests. State v. Yonkman, 312 P.3d 1135, 1138.

_Ariz.App._2011. Quot. in sup, cit. in ftn. Real estate developer sued surveying firm for breach of contract, inter alia, after firm, which was hired by developer's general contractor, staked an apartment building in a location inconsistent with developer's site plan, thereby violating setback and floodplain requirements. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held that there was insufficient evidence of the existence of a contract between plaintiff and defendant based upon an agency theory. The court pointed to evidence that plaintiff did not exercise authority over the hiring process or decisions of general contractor, which acted as an independent contractor; moreover, even if contractor had been plaintiff's agent, there was no evidence that contractor ever disclosed to defendant that it was acting in that capacity when it engaged defendant's services, and thus defendant had no notice that plaintiff was a party to defendant's agreement with contractor. Goodman v. Physical Resource Engineering, Inc., 270 P.3d 852, 856.

_Ariz.App._2009. Quot. in sup. Home builders association sued city, seeking a declaration that city's development impact fee ordinances were unlawful under a state statute requiring city to offset the fees with added tax revenues. The trial court denied special action relief for plaintiff. Affirming, this court held, inter alia, that city consultant's testimony was admissible at an evidentiary hearing to determine whether city had complied with the statutory requirement that it give good-faith consideration to future taxes to be collected from development property owners, since it showed consultant's state of mind as he created the plan that city adopted on his advice; under agency principles, city consultant's testimony of his investigation and consideration of relevant future revenues constituted evidence of city's “consideration” of those revenue sources. Home Builders Ass'n of Cent. Arizona v. City of Goodyear, 223 Ariz. 193, 221 P.3d 384, 390.

_Ariz.App._2007. Quot. in disc. Estate of nursing-home patient sued nursing home for, in part, negligence and breach of contract. The trial court dismissed the complaint and compelled arbitration. Affirming, this court held, inter alia, that patient had implicitly
authorized his wife to act as his agent to bind him to the alternative-dispute-resolution agreement that she signed when patient was admitted to defendant's facility. The court concluded that, absent any contrary evidence, the medical records that defendant produced, revealing a history of wife's acting and making decisions on patient's behalf, reflected that patient intended wife to act as his agent. 


Cal.App. 2011. Cit. in ftn. Association of rental housing owners filed a petition for a writ of mandate challenging city's residential rental inspection ordinance, alleging, among other things, that the ordinance was unconstitutional in that it forced landlords to act as city's “agents” by requiring landlords to exercise good faith in attempting to obtain tenant consent to city inspection. The trial court ruled that the ordinance was unconstitutional on its face. Vacating and remanding, this court held, among other things, that there was no conflict, express or implied, between the ordinance's good faith requirement and the general law of agency. The court explained that the “good faith requirement” was not a bilateral agreement between city and landlords, a necessary prerequisite for creation of an agency relationship. Rental Housing Owners Assn. Of Southern Alameda County, Inc. v. City of Hayward, 200 Cal.App.4th 81, 90, 133 Cal.Rptr.3d 155, 162.

Cal.App. 2007. Quot. in sup., coms. (c) and (d) cit. and quot. in sup. Calendar-distribution corporation and its owner sued former owners of the corporation for, in part, breach of the duty of loyalty, alleging that defendants neglected their duties as corporation's managing agents, and misappropriated corporation's customer list and used it to solicit business for a competing company. The trial court granted plaintiffs a preliminary injunction. Affirming, this court held, inter alia, that plaintiffs were likely to succeed in establishing that defendants owed them a duty of loyalty. The court reasoned that defendants' duty of loyalty, particularly the duty not to compete, arose, not from the purchase contract's noncompetition clause, which only prohibited defendants from competing “as an owner,” but from the parties' agency relationship, to which defendants assented when they agreed to act as managing agents. Huong Que, Inc. v. Luu, 150 Cal.App.4th 400, 411, 413-415, 58 Cal.Rptr.3d 527, 535, 538, 539.

Colo.

Colo. 2012. Com. (g) cit. and quot. in diss. op. Grantor of a deed of trust on a condominium unit in favor of bank sued bank and public trustee that sold the unit at a foreclosure sale, seeking to enjoin the issuance of the deed to the successful bidder and to compel trustee to allow her to redeem. While the trial court determined that bank failed to strictly comply with the notice requirements of the rule governing orders authorizing sales under powers, it declined to declare the sale null and void, and, after a bench trial, dismissed grantor's redemption claim. The court of appeals affirmed in part. Affirming in part, this court held that, because the parties received actual notice and no prejudice resulted, the failure to strictly comply with notice requirements did not mandate setting aside a completed foreclosure sale. The dissent argued that it was error to assume that co-grantor's estate, as an interested party, had constructive notice of the foreclosure proceedings through actual notice to plaintiff, who was also personal representative of co-grantor's estate, since it was not necessarily the case that a fiduciary relationship also involved an agency relationship. Amos v. Aspen Alps 123, LLC, 2012 CO 46, 280 P.3d 1256, 1267.

Colo.App.

Colo.App. 2009. Quot. in sup. Concrete-pumping business sued competitor and former employee who resigned and began working for competitor, alleging, among other things, breach of the duty of loyalty and aiding and abetting such a breach. After a bench trial, the trial court found in favor of defendants. Affirming in part, this court held, inter alia, that, while employee owed plaintiff a duty of loyalty because he was a manager with sufficient authority that the principal/agent analogy was apt, he did not breach his duty to plaintiff. The court noted that permissible pretermination activities included “arranging for space
and equipment,” and that the extent of employee's conversations with competitor regarding competitor's equipment needs was minimal. Lucht's Concrete Pumping, Inc. v. Horner, 224 P.3d 355, 360.

Colo.App. 2007. Com. (e) quot. in disc. and cit. in sup. Broker that sold insurance protecting ski resorts against the risk of reduced snowfall brought suit for breach of fiduciary duty against insurer that wrote the insurance policies, alleging that defendant, as the principal in an agency relationship with plaintiff, owed it a fiduciary duty, and breached its duty by improperly handling the ski resorts' claims. The trial court entered judgment on a jury verdict for plaintiff. Reversing on this claim and remanding, this court held that defendant did not owe plaintiff any fiduciary duty under the circumstances, since, as a matter of law, a principal was not a fiduciary of an agent; even if a principal could owe such a duty under some circumstances, no such circumstances existed here because plaintiff was an independent broker looking out for its own interests. MDM Group Associates, Inc. v. CX Reinsurance Co. Ltd., 165 P.3d 882, 889.

Conn.App.

Conn.App. 2010. Com. (c) quot. in sup. Prospective purchaser of commercial property sued seller for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), after seller terminated the parties' purchase-and-sale agreement and accepted an offer from a third party to buy the property. The trial court entered judgment for plaintiff. Affirming, this court held that defendant acted in bad faith, for purposes of the implied covenant of good faith and fair dealing, in terminating the agreement; there was ample evidence that it was within the scope of authority of defendant's real-estate agent to conduct contract negotiations with third-party purchaser on behalf of defendant, and that third party's more favorable purchase offer was a motive for defendant's termination of its contract with plaintiff. The court also held that the conduct of defendant's attorney in negotiating with third party could be imputed to defendant for purposes of liability under CUTPA, since attorney was acting within the scope of his authority as defendant's agent. Landmark Investment Group, LLC v. Chung Family Realty Partnership, LLC, 125 Conn.App. 678, 692, 703, 10 A.3d 61, 74, 81.

Conn.App. 2010. Quot. in case quot. in disc. In a property dispute between university and limited-liability corporation, the trial court entered a judgment of possession in favor of university based on a settlement agreement between the parties. The trial court subsequently denied university's motion to open and set aside the judgment. Affirming, this court held that the trial court correctly concluded that university's attorney possessed apparent authority to enter into a settlement agreement and bind university to the terms of the agreement; university's vice president, by his failure to indicate that his approval was necessary, caused or allowed limited-liability corporation to believe that university's attorney had the authority to settle the dispute. Yale University v. Out of the Box, LLC, 118 Conn.App. 800, 807, 990 A.2d 869, 874.

Conn.App. 2009. Quot. in sup. Prospective sellers of real property sued limited-liability company and principal of company who sought to acquire the property for a proposed auto raceway, after defendants were unable to obtain the necessary zoning approvals and the sale did not take place. After a bench trial, the trial court rendered judgment for defendants. Affirming, this court held, inter alia, that a licensed real-estate agent who was acting as the parties' dual agent for the sale did not have actual authority to bind defendants by accepting certain unilateral changes made by plaintiffs to the contractual closing date. The court cited testimony by both principal and agent that at no time did principal give agent the authority to bind company, and that everyone involved with company understood that no one except principal himself had the authority to bind company. LeBlanc v. New England Raceway, LLC, 116 Conn.App. 267, 274, 976 A.2d 750, 758.

Del.

Del. 2011. Quot. in sup. and cit. in ftn. Seller brought breach of fiduciary duty and other claims against real estate agent who represented her in the sale of her house to real estate investor, after learning that agent also represented investor in a second sale
of the same house on the same day to a second buyer at a higher price. After a jury trial, the trial court granted agent's motion for a directed verdict. Reversing and remanding for a new trial, this court held that plaintiff raised genuine and disputed issues of material fact as to whether agent breached his fiduciary duties to seller. The court noted that seller and agent manifested the necessary assent to form an agency relationship, under which agent owed seller traditional fiduciary duties, by signing a listing agreement for the house. Estate of Eller v. Bartron, 31 A.3d 895, 897.

D.C.App.

D.C.App. 2007. Quot. in sup., com. (e) quot. in sup. Homeowner's brother, on behalf of homeowner, sued real estate agent he hired to sell homeowner's property for, among other things, breach of fiduciary duty. After a bench trial, the trial court entered judgment in favor of plaintiff. Affirming, this court held, inter alia, that there was ample evidence to support the trial court's finding that defendant breached his fiduciary duty to plaintiff by, among other things, failing to memorialize the terms of the parties' oral contract in a written listing agreement. The court stressed that the fiduciary duty owed by a real estate agent required the exercise of the highest fidelity toward the principal and encompassed an obligation to inform the principal of every development affecting his interest. Jenkins v. Strauss, 931 A.2d 1026, 1032, 1033.

Ill.App.

Ill.App. 2014. Com. (c) quot. in sup. Shareholder of a 50% interest in three companies brought, inter alia, claims for civil conspiracy against other 50% shareholder and other shareholder's wife, alleging that defendants conspired to convert funds belonging to plaintiff by transferring those funds from the companies to a payroll-servicing company wholly owned by other shareholder and by keeping 100% of the rental profits. The trial court granted defendants' motion to dismiss the conspiracy claims. Affirming in part, this court held that plaintiff failed to state claims for civil conspiracy against wife, because his allegations that wife was responsible for issuing checks, initiating transfers from companies to payroll-servicing company where she worked, and making rental payments at her husband's request clearly asserted that wife was acting as husband's agent. The court pointed out that the general rule was that there could be no conspiracy between a principal and an agent, because the acts of an agent were considered in law to be the acts of the principal. Kovac v. Barron, 2014 IL App 121100, 6 N.E.3d 819, 839.

Ill.App. 2009. Com. (c) cit. and quot. in sup. Provider of special-education school-bus transportation services brought antitrust claims against one of its officers, competing company owned by that officer, and others, alleging, among other things, that defendants conspired to artificially increase prices and to reduce and restrain competition. The trial court granted defendants' motion to dismiss. Affirming in part, this court held, inter alia, that the claims failed under the Antitrust Act, which did not provide relief for self-inflicted wounds, because plaintiff was essentially alleging that it conspired with defendants against itself; officer was corporation's agent, and the acts of an agent were considered in law to be the acts of the principal. Alpha School Bus Co., Inc. v. Wagner, 391 Ill.App.3d 722, 331 Ill.Dec. 378, 910 N.E.2d 1134, 1150, 1152.

Ind.

Ind. 2014. Quot. in sup. Parents of 18-year-old freshman who died of acute alcohol ingestion while pledging a local fraternity brought an action for wrongful death against national fraternity, alleging, among other things, that defendant was vicariously liable for the negligence of the local fraternity and its members. The trial court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held, as a matter of law, that an agency relationship did not exist between defendant and the local fraternity or its members. The court reasoned that, although the local fraternity and its members were subject to remedial sanctions, in their choice of conduct and behavior, the local fraternity and its members were not acting on behalf of defendant and were not subject to its control. Smith v. Delta Tau Delta, Inc., 9 N.E.3d 154, 164.
Ind. 2014. Quot. in sup., com. (c) cit. and quot. in sup., com. (g) quot. in sup. College freshman/fraternity pledge who resided in a fraternity house owned by college brought a personal-injury action against college, fraternity's local chapter, fraternity's national organization, and another student/fraternity member, alleging that the other student injured him in a hazing incident. The trial court granted summary judgment for defendants. The court of appeals affirmed. Affirming as to college and national organization, this court held that the actions of local fraternity and its members could not, as a matter of law, be imputed to college or national organization under a theory of vicarious liability, because the record established the lack of any agency relationship between local fraternity and college or national organization. While local fraternity operated only with college's permission and subject to college's policies and discipline, mere consent to governance did not equate to agency, and there was no evidence that local fraternity exercised actual management and control over resident members at the direction of and on behalf of national organization. Yost v. Wabash College, 3 N.E.3d 509, 519, 521.

Ind. 2012. Cit. in sup. §§ 1.01-1.02. Second mortgagee obtained a default judgment against mortgagor and foreclosed on the mortgaged property without notice to assignee of first mortgagee's nominee. The trial court denied assignee's motion to intervene in the foreclosure proceeding and obtain relief from the foreclosure judgment. This court reversed the trial court's ruling and remanded with instructions to grant assignee's motion to intervene and to amend the default judgment to provide that second mortgagee took the property subject to assignee's lien. The court concluded that, while nominee was indeed a "nominee" only and not a "mortgagee" as elsewhere ambiguously stated in the first mortgage contract, rights under the first mortgage and its own rules indicated that the parties intended to designate it as an agent of the lender, and thus assignee, standing in the shoes of nominee, had a property interest in this case sufficient to entitle it to intervene as of right. Citimortgage, Inc. v. Barabas, 975 N.E.2d 805, 814.

Iowa, 2014. Quot. in sup. Following estate's sale of decedent's residential real estate over the objections of decedent's common-law wife, who contended that the property was her home, the trial court, on remand, concluded that wife should, at her election, receive either the proceeds from the sale or the real estate itself upon payment to the purchasers of a substantial part of the cost of the improvements made by them. Affirming as modified and remanding, this court held, inter alia, that the purchasers of the real estate were good-faith purchasers at a judicial sale for purposes of the occupying claimants' statute, entitling them to compensation for their improvements. Citing Restatement Third of Agency § 1.01, the court concluded that purchasers' good-faith was not negated by the knowledge of their alleged agents, including purchaser-husband's stepfather, of the selling officers' want of authority to sell decedent's house, declining to find that recurring contact and familial relationship alone created an agency relationship. In re Estate of Waterman, 847 N.W.2d 560, 574.

Iowa, 2011. Quot. in ftn. Plaintiff sued husband-and-wife homeowners, alleging that he broke his leg while helping them move their furniture using a rented moving truck. The trial court granted summary judgment for defendants, finding that a release that plaintiff had signed with truck-rental company's liability insurer barred plaintiff's claims against defendants. The court of appeals reversed. Vacating and remanding, this court held, among other things, that fact questions precluded summary judgment for wife, since husband alone signed the rental agreement and was identified by name in the release. The court concluded that a genuine issue of material fact existed as to whether husband and wife were in an agency relationship within the meaning of the release such that her liability was also discharged. Peak v. Adams, 799 N.W.2d 535, 547.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

Ky.

2010. Cit. in sup. Members of a workers' compensation self-insurance group sued group's accounting and auditing firm, alleging that, as a result of misrepresentations, omissions, and false statements contained in firm's audits of group, they were required to pay assessments to cover group's financial deficits. The trial court denied firm's motion to enforce arbitration provisions in group's engagement letters with firm. While reversing upon finding that members were bound by the provisions, this court held that members were not bound on the basis that group acted as their agent when it executed the engagement letters. The court reasoned that group procured the audits from firm for itself, not as an agent on behalf of members, because the state's statutory auditing requirements pertained only to group, and thus members had no duty to obtain the audits and no need of an agent in obtaining them. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 694.

Ky. 2003. Illus. 14 cit. in disc. (T.D. No. 2, 2001). After two intoxicated high school students left school together during school-sponsored activity in order to buy more alcohol, student passenger was killed in car accident. His parents and estate sued state Department of Education (DOE) for negligence and wrongful death. Trial court affirmed board of claims' dismissal of suit, and appeals court affirmed. This court affirmed dismissal for loss of consortium but reversed dismissal for wrongful death, holding that DOE could be held vicariously liable, because statutory relationship between DOE and local school board was more akin to that of principal-agent than to that of coagents. Legislative intent was to vest management, operation, and control of schools in DOE, with local boards acting as agents to implement DOE's policies at local level. *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 152.

Mass.

2008. Cit. in sup., coms. (c) and (g) cit. in sup. Current trustees and beneficiary sued former trustees, alleging that defendants breached their fiduciary duties in 1972 by converting a number of stock shares that were being held in trust for beneficiary. The trial court granted summary judgment for defendants on limitations grounds. Vacating in part and remanding, this court held that, even though the trust's successor trustee knew in 1984, upon his succession to that position, of potential claims in connection with the alleged conversion in 1972, but did not assert them, the statute of limitations did not begin to run, and thus plaintiffs' claims were not time-barred, because successor trustee had served as attorney for one of the defendants and thus was his agent with respect to that redemption. *O'Connor v. Redstone*, 452 Mass. 537, 557, 896 N.E.2d 595, 611.


2013. Cit. in ftn., cit. in cases cit. in ftn., com. (c) cit. in ftn. After corporation was acquired in a merger, shareholders' agent, who was designated under the merger agreement to serve as the representative of corporation's former shareholders, sued company that acquired corporation, seeking a declaration that defendant was not entitled to indemnification from an escrow fund that had been established in connection with the merger. The trial court approved a settlement between defendant and certain former shareholders of corporation who opted to settle directly with defendant. Affirming, this court held, among other things, that the settling shareholders had the power to negotiate the settlement with defendant, because the merger agreement gave plaintiff an express right to negotiate with defendant and to bind corporation's shareholders, but not a contractually exclusive right to do so. The court noted that even an agent holding broad powers held and exercised those powers as a result of a voluntary conferral by the principal. *Bailey v. Astra Tech, Inc.*, 84 Mass.App.Ct. 590, 596, 999 N.E.2d 138, 144.

Miss.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

Miss. 2011. Com. (c) quot. in fn. After minority member of LLC signed a deed purporting to transfer a parcel of LLC's property to his own secretly formed LLC, which then granted a deed of trust to secure a bank loan, defaulted on the loan, filed for bankruptcy, and listed the property as an asset, LLC's majority member filed an objection in secretly formed LLC's bankruptcy proceedings. The bankruptcy court entered judgment for LLC, declaring secretly formed LLC's deed null and void and bank's deed of trust also void. Bank appealed to the district court, which affirmed. Bank again appealed to the Fifth Circuit Court of Appeals, which certified a question to this court. Answering the question, this court held that, where, as here, no actual or apparent authority existed for an agent to transfer a principal's property, the conveyance was not an effective transfer of title that was voidable, but, rather, void unless and until later ratified. Northlake Development L.L.C. v. BankPlus, 60 So.3d 792, 796.

Miss. 2005. Cit. in disc. (T.D. No. 2, 2001). Contractors working on mall-renovation project sued mall owner after construction manager hired by owner misappropriated funds remitted by owner for payment of contractors. The trial court granted summary judgment for owner, finding, inter alia, that there was no agency relationship between owner and manager, because manager acted as an independent contractor. Reversing and remanding, this court held, among other things, that fact issues existed as to whether an agency relationship between owner and manager existed and that, if such a relationship were established, owner's payments to manager would not extinguish owner's debt to plaintiffs. The court noted that the essence of agency was that the agent acted on behalf of the principal and was subject to the principal's control. Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co., 914 So.2d 169, 175.

Miss.App.

Miss.App. 2010. Cit. in case quot. in sup. (T.D. No. 2, 2001). Subcontractors sued property owner, seeking to hold it liable for costs owed them by general contractor for their work on the construction of a building. The trial court found in favor of defendant. Affirming, this court held, inter alia, that the trial court's finding that general contractor was not acting as defendant's agent was supported by substantial evidence. While plaintiffs alleged that defendant gave general contractor actual authority to act as its agent in constructing the building, the contract between defendant and general contractor defined their relationship as one between owner and contractor, and the evidence fell short of establishing that defendant exercised any direct authority over plaintiffs. Summerall Elec. Co., Inc. v. Church of God at Southaven, 25 So.3d 1090, 1095.

Miss.App. 2003. Quot. in sup. (T.D. No. 2, 2001) (Erron. cit. as § 1). Landowner brought action to quiet title to two parcels of land allegedly encroached upon by neighboring landowners. Trial court held that defendant landowners adversely possessed two parcels, but later entered supplemental judgment reducing award to one parcel. Affirming, this court held, inter alia, that defendants' emancipated children, who used land for own benefit, were not defendants' agents for purposes of establishing adverse possession where children were not subject to defendants' control and were not acting on defendants' behalf. Norris v. Cox, 860 So.2d 319, 323.

Mo.App.

Mo.App. 2013. Com. (c) cit. in fn. After motorist drove into the wrong lane in a construction zone, causing her car to drop into a large hole, injured passenger and others sued general contractor that was hired to perform the construction work and subcontractor that was hired to provide traffic-control services, alleging that defendants negligently failed either to barricade or cover the hole or to provide traffic controls sufficient to direct motorists around it. The trial court entered judgment on a jury verdict in favor of defendants. Affirming, this court held that the trial court did not err by permitting defendants to argue before the jury that they acted as ordinary and prudent persons by doing only what was asked of them by contract. The court nevertheless concluded that defendants were not entitled to rely on a defense to liability available to "employee" road contractors, because defendants were independent contractors or "non-agent service providers" rather than employees of the owner of the bridge. Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850, 866.
Neb.

Neb. 2009. Quot. in disc. and cit. in ftn. Son, as mother's next of kin and trustee of her estate, sued nursing home in connection with injuries, pain, and suffering allegedly sustained by mother while she was a patient. The trial court granted defendant's motion to compel arbitration pursuant to an arbitration agreement signed by defendant on behalf of mother as part of the paperwork for her admission. Reversing and remanding, this court held that, while mother authorized defendant to sign the required admission papers, his actual authority did not extend to signing the arbitration agreement, because it was not a condition of admission, and defendant was not justified in relying solely on mother's authorization of defendant to sign admission papers as apparent authority to bind her to an arbitration agreement, because nothing in the record suggested that a reasonable person would have expected an arbitration agreement to be included with admission documents for a nursing home. Koricic v. Beverly Enterprises—Nebraska, Inc., 278 Neb. 713, 718, 773 N.W.2d 145, 150.

N.J.

N.J. 2010. Quot. in sup. Lawyers' fund for client protection, as subrogee of attorney's clients whose funds deposited with attorney to close on a new home had been misappropriated by attorney from attorney's trust account, sought to recover the amount of the stolen funds from title insurer from which attorney, after the theft, purchased title insurance for the home. The trial court granted summary judgment for defendant; the appellate division reversed. Reversing and remanding for reinstatement of the original judgment for defendant, this court held that defendant was not liable for the misappropriation by attorney, in part because no agency relationship existed between attorney and defendant at the time the funds were misappropriated; insurer never represented to attorney's clients that attorney had actual or apparent authority to act on its behalf. New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co., 203 N.J. 208, 220, 1 A.3d 632, 639.


N.J.Super.App.Div. 2011. Quot. in case quot. in disc. After the roof of its warehouse collapsed, landlord sued, among others, managing general agent of tenant's former liability insurer, alleging that defendant was professionally negligent in causing tenant's policy to be improperly canceled and for failing to reinstate it. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that tenant's premium-finance lender had apparent authority to act for tenant in canceling the policy following tenant's default on its payments to lender, and defendant was entitled to rely on that authority to cancel the policy, even if lender's power of attorney authorizing cancellation of the policy for nonpayment did not comply with statutes governing creation of a valid power of attorney; defendant had received no notice that the power of attorney was invalid, and tenant had created the appearance of authority by allowing lender to procure the policy and renew it. AMB Property, LP v. Penn America Ins. Co., 418 N.J.Super. 441, 454, 14 A.3d 65, 72.

N.M.

N.M. 2011. Com. (c) quot. in sup. Undisclosed client that had requested, through its law firm, public records relating to a particular television documentary program brought an enforcement action under the New Mexico Inspection of Public Records Act against multiple public agencies. The trial court dismissed the complaint; the court of appeals affirmed. Reversing in part and remanding, this court held that a principal, whether disclosed or not, could delegate the function of requesting public records to an agent, such as the principal's attorney, and that either the agent or the principal, even if previously unknown to the public records custodian, could enforce that request if it was denied; thus, in this case, client had standing to enforce the public records request it made through law firm, as its agent. The court noted that the application of agency law was not limited to contracts
but instead encompassed a wide and diverse range of relationships and circumstances; for instance, a person could use an agent to take action under the authority of a statute, even when the agent was not the person specifically identified in the statute. San Juan Agr. Water Users Ass’n v. KNME-TV, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, 890.

N.M. 2007. Quot. in sup. Insured brought bad-faith action against insurer that denied her property-damage claims under a policy that insurer issued while acting as a servicing insurer for statutory nonprofit underwriting association. The district court denied insurer’s motion to dismiss. The court of appeals reversed, ruling that insurer was statutorily immune from suit. Reversing and remanding, this court held that insurer was not immune as an agent of association. The court reasoned that, while insurer and association agreed that insurer would issue policies to persons referred by association, and in return association would reinsure all such policies and reimburse insurer’s related costs and expenses, that agreement did not evince the control necessary to form or constitute an agency relationship. Maes v. Audubon Indemnity Ins. Group, 2007-NMSC-046, 142 N.M. 235, 164 P.3d 934, 939, cert. denied 552 U.S. 1100, 128 S.Ct. 908, 169 L.Ed.2d 730 (2008).

N.Y. 2011. Cit. in disc. State attorney general sued insurance brokerage firm, alleging that it engaged in repeated fraudulent or illegal acts, was unjustly enriched, committed common-law fraud, and breached its fiduciary duties by entering into incentive arrangements in which insurers rewarded it for bringing them business, and by failing to disclose the arrangements to its customers. The trial court dismissed, and the appellate division affirmed. Affirming, this court held that an insurance broker did not have a common-law fiduciary duty to disclose to its customers incentive arrangements that it had entered into with insurers; while an insurance broker was the agent of the insured, it customarily looked for compensation to the insurer, not the insured, and was sometimes the insurer’s agent also—for example, when collecting premiums. People ex rel Cuomo v. Wells Fargo Ins. Services, Inc., 16 N.Y.3d 166, 171, 919 N.Y.S.2d 481, 944 N.E.2d 1120, 1122.

N.Y.Sup.Ct.App.Div. 2009. Cit. in sup. Bicyclist sued property owner and city for personal injuries she allegedly sustained when she rode her bicycle into a hole located in the driveway apron in front of owner's property. The trial court granted summary judgment for city. Affirming, this court held, inter alia, that city did not have an agency relationship with owner. The court noted that, while city had agreed to place a blacktop patch on a cracked portion of the apron if owner cleared out any loose debris from that section of the apron, there was no evidence in the record that owner was acting on city’s behalf or under its control when he decided to replace the entire apron and removed not only the loose debris but also a large section of the apron. Davis v. City of Schenectady, 65 A.D.3d 743, 745, 883 N.Y.S.2d 810, 812.

N.Y.Sup.Ct. 2011. Quot. in ftu. Purported assignee of promissory note and mortgage brought a foreclosure action against mortgagor. While mortgagor initially defaulted, he later moved to vacate the default and dismiss the foreclosure action. Denying mortgagor's motion, this court held, inter alia, that plaintiff had standing to bring the foreclosure action, where plaintiff held the properly endorsed note and also held the mortgage pursuant to an assignment from the Mortgage Electronic Registration Systems (MERS), which had the authority to assign the mortgage as the underlying lender's nominee, and was as well a common agent on all mortgages registered by members of the MERS system. Deutsche Bank Nat. Trust Co. v. Pietranico, 33 Misc.3d 528, 928 N.Y.S.2d 818, 832.
§ 1.01 Agency Defined, Restatement (Third) Of Agency § 1.01 (2006)

Ohio

**Ohio**, 2009. Cit. in sup. Defendant was convicted in trial court of compelling prostitution in violation of a state statute after he agreed to pay $500 in exchange for sexual activity involving a woman and her fictitious 11-year-old daughter. The court of appeals reversed. Affirming, this court held, inter alia, that a defendant could not be convicted of compelling prostitution under the statute without the existence of an actual minor whom the defendant paid or agreed to pay. The court reasoned that, although the statute did not explicitly state that an actual minor had to exist, there was a reasonable argument that an actual minor was required under the statute; among other things, the statute addressed payment to a “minor's agent,” and, in order for a minor's agent to exist, it followed that a minor principal also had to exist. *State v. Bartrum, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, 964.*

Okl.

**Okl.** 2010. Cit. in sup. Surety bail bondsmen appealed the decision of the administrative law judge upholding the state insurance commissioner's construction of a provision of the bail-bondsmen statute as allowing a professional bondsman to act as surety on more than 10 bonds a year outside his county of registration by employing a surety bondsman to write bonds on the professional bondsman's behalf pursuant to a power of attorney. The trial court affirmed, and the court of civil appeals affirmed the trial court's judgment. This court reversed the trial court's judgment and remanded, holding that the statute limited a professional bondsman to writing no more than 10 bonds a year in a county where he was not registered; furthermore, he could not circumvent the statute by employing a surety bondsman, because the authority of a surety bondsman acting pursuant to a power of attorney was coextensive with that of the professional bondsman executing the power of attorney. *Surety Bail Bondsmen of Oklahoma, Inc. v. Insurance Com'r, 2010 OK 73, 243 P.3d 1177, 1185.*

Or.

**Or.** 2013. Com. (f) quot. in case cit. in sup. In several federal court cases, homeowners who were threatened with nonjudicial foreclosure under the Oregon Trust Deed Act (OTDA) contended, inter alia, that identification of the Mortgage Electronic Registration Systems, Inc. (MERS)—an entity that did not make, service, or invest in loans—rather than the lender, as the trust deed's beneficiary was ineffective, because the OTDA required the recording of any assignment of a trust deed by the owner of the beneficial interest in the trust deed. The district court certified questions to this court. In answering the questions, this court held, inter alia, that the OTDA did not allow MERS to hold and transfer legal title to a trust deed as nominee for the lender. As to whether MERS nevertheless had authority as an agent for the original lender and its successors in interest to act on their behalves with respect to the transfer of the beneficial interest in the trust deed or the nonjudicial foreclosure process, the court explained that MERS's authority, if any, to perform any act in the foreclosure process derived from the original beneficiary and its successors in interest, and there was insufficient evidence in the record to determine the existence, scope, or extent of any such authority. *Brandrup v. ReconTrust Cop., N.A., 353 Or. 668, 707, 303 P.3d 301, 322.*

**Or.** 2009. Coms. (f) and (g) quot. in sup. Passenger who was injured while riding an airport shuttle bus brought negligence action against bus driver and driver's employer, which provided shuttle-bus service under a contract with airport. The trial court granted summary judgment for defendants. The court of appeals affirmed. Reversing and remanding, this court held that defendants failed to demonstrate that plaintiff's only permissible tort action was against airport because they were airport's agents within the meaning of the state tort claims act; the contract did not provide that airport had the right to control the physical manner in which the drivers carried out their driving duties, and thus did not support the conclusion that employer or its employees, including driver, were acting as airport's agents for purposes of imposing vicarious liability on airport for their alleged negligence. *Vaughn v. First Transit, Inc., 346 Or. 128, 135, 136, 140, 206 P.3d 181, 186, 189.*
Motorcyclist brought a negligence action against pizza delivery driver, pizza franchisee that employed driver, and franchisor, alleging that he was injured when his motorcycle collided with a vehicle operated by driver. The trial court granted franchisor's motion for summary judgment, and entered a limited judgment for franchisor. Affirming, this court held that the facts were insufficient to establish franchisor's vicarious liability for the negligent driving of franchisee's employee. The court reasoned that franchisee was, at most, a nonemployee agent of franchisor, and that, under the franchise agreement, franchisor did not have the right to control the physical details of the conduct that injured plaintiff—namely, the manner in which driver carried out his driving duties for franchisee. *Viado v. Domino's Pizza, LLC*, 230 Or.App. 531, 534, 544, 217 P.3d 199, 201, 207.

Investors who took out a home-equity loan from mortgage broker on the advice of investment advisor and then loaned part of the proceeds to advisor for investment in his family's trucking business brought claims for fraud, negligent misrepresentation, and conversion, inter alia, against broker and advisor, among others, after advisor stopped making the promised monthly interest payments to plaintiffs. The trial court granted summary judgment for broker on all but one of plaintiffs' claims, holding that broker was not liable for advisor's acts under theories of agency. Reversing in part and remanding, this court held, among other things, that plaintiffs presented at least a mere scintilla of evidence to create a genuine issue of material fact as to whether an actual agency relationship existed between advisor and broker. The court reasoned that, although broker asserted that it had never employed advisor, advisor admitted in his answer to plaintiffs' complaint that he acted as an agent or employee of broker. The dissent argued that plaintiffs failed to present any evidence of an agency relationship, because advisor's answer contained only the bare conclusion that he was an agent, with no evidence to support this conclusion. *Froneberger v. Smith*, 748 S.E.2d 625, 631, 638.

Beneficiary who was denied benefits under her deceased husband's life-insurance policy sued insurance agents, alleging that defendants breached their contract with plaintiff and her husband by failing to procure a life insurance policy for husband that was not subject to contest. The trial court entered judgment for plaintiff; the court of appeals affirmed in part and remanded. Affirming in part, this court held that the wrongful conduct or omissions of defendants gave rise to a claim for failure to procure. A concurring and dissenting opinion argued that, while defendants were not liable as agents for plaintiff and her husband on plaintiff's contractual failure-to-procure claim, because there was no evidence that husband requested or that defendants offered to obtain immediately incontestable life insurance policies and because it was undisputed that husband received the insurance he requested, plaintiff's recovery of damages could be sustained based on defendants' breach of their fiduciary duties as insurance agents to exercise reasonable skill, care, and diligence in obtaining insurance coverage for plaintiffs as their clients. *Morrison v. Allen*, 338 S.W.3d 417, 450.

Hotel employee sued hotel franchisor, among others, for wrongful termination, and additionally alleged that defendant was vicariously liable for her supervisor's abusive actions amounting to intentional infliction of emotional distress, and was negligent in its duty to supervise him. The trial court dismissed plaintiff's claims. Affirming, this court held, inter alia, that implementation of standards by defendant through inspections, guest comment cards, and training...
requirements to ensure guest satisfaction did not evidence express or implied actual authority flowing from defendant pertaining to treatment of hotel employees, and could not be construed to create an agency relationship; there was no evidence that defendant had the right to control or, in fact, did control supervisor's day-to-day supervisory interactions with plaintiff. Nears v. Holiday Hospitality Franchising, Inc., 295 S.W.3d 787, 796.

Utah App.

Utah App. 2012. Cit. in sup., cons. (b) and (c) quot. in sup. Motorcyclist brought a personal-injury action against university and university traffic cadet, among others, alleging that he was struck by an automobile after cadet directed him out of a university parking lot. The trial court dismissed the complaint, holding that, because cadet was directing traffic under color of city's authority, she was an employee of the city and was entitled to governmental immunity under the Governmental Immunity Act of Utah (GIAU). Reversing in part and remanding, this court held that the evidence was insufficient to determine if defendants were acting under city's control and direction while performing traffic-control activities, such that they were agents of the city acting as its employees and were expressly covered by the GIAU. Mallory v. Brigham Young University, 2012 UT App 242, 285 P.3d 1230, 1236, 1237.

Utah App. 2011. Quot. in sup. Disability benefits plan administrator sued city police officer for breach of contract, alleging that officer failed to reimburse plan for disability overpayments; officer counterclaimed for breach of contract and filed a third-party complaint against city. The trial court granted city's motion for summary judgment, finding that officer violated the terms of the plan when he failed to arbitrate his claim. Reversing, this court held that administrator waived its right to arbitrate when it filed its complaint; moreover, because administrator was contractually obligated to act on behalf of city, when administrator initiated this suit against officer, it acted as city's agent, and waived not only its own right to arbitrate, but also city's. Educators Mut. Ins. Ass'n v. Evans, 2011 UT App 171, 258 P.3d 598, 614.

Utah App. 2007. Quot. in sup. Pedestrian sued university for negligence after she fell down university's stairway and was injured. The trial court granted defendant's motion to dismiss. Affirming, this court held, inter alia, that the trial court properly admitted the responding university emergency medical technicians' (EMTs') report containing certain admissions by plaintiff, because the statements were made for the purpose of medical diagnosis and treatment, and the Utah Rules of Evidence permitted admission, regardless of whether the EMTs were adverse or neutral parties. The court noted that, while the EMTs were volunteers, they were nonetheless adverse to pedestrian as agents of university because they worked under university's name, used equipment supplied by university, and operated from university's buildings. Fox v. Brigham Young University, 2007 UT App 406, 176 P.3d 446, 451.

Vt.

Vt. 2009. Cit. in ftn., com. (c) cit. in sup. Former employee sued former supervisor, alleging, among other things, discrimination under the Vermont Fair Employment Practices Act (VFEPAA). The trial court granted summary judgment for supervisor, finding that the VFEPAA provided a right of action against employers alone, and not against individual employees or supervisors. Reversing and remanding, this court held, inter alia, that, by including the phrase “and any agent” in the definition of “employer,” the VFEPAA allowed for suits against employees as individuals. The court noted that the employer-employee relationship was a traditional, common-law agency relationship; thus, an ordinary reading of the language “any agent” supported the conclusion that the VFEPAA allowed for suits against employees acting as agents for the employer. Payne v. U.S. Airways, Inc., 2009 VT 90, 186 Vt. 458, 987 A.2d 944, 948, 953.
Wash.

Wash.2011. Quot. in sup. Medical-imaging company that retained an independent contractor whose radiologists interpreted images generated by company appealed from the trial court's grant of summary judgment in favor of the department of revenue holding that company had to pay business and occupation tax on the entire amount received from patients/insurers and could not count amounts paid to contractor as “pass-through” payments on which it did not owe tax. The court of appeals reversed. This court reversed the court of appeals and reinstated the trial court's grant of summary judgment, holding that company's payments to contractor did not qualify for pass-through treatment, because company did not make the payments to contractor on behalf of patients as their agent; patients had no obligation to pay contractor, and company did not act in an agent's capacity to pass payments from the patients through to contractor. Washington Imaging Services, LLC v. Washington State Dept. of Revenue, 171 Wash.2d 548, 252 P.3d 885, 892.

Wash.App.

Wash.App.2011. Com. (f)(2) cit. in ftn. Former executive director of nonprofit corporation sued corporation, alleging that he was discharged in retaliation for requesting that defendant's board members provide proof of their legal status, or resign if they were not legally in the United States, in order to avoid compromising corporation's future government funding. After defendant and certain board members refused to respond to plaintiff's requests for discovery regarding the citizenship and immigration status of its board members, the trial court granted plaintiff's motions to compel and, later, to sanction defendant. Although the parties settled and requested dismissal of defendant's interlocutory appeal, rendering the action moot, this court nevertheless held that a corporation could not refuse to respond entirely, as defendant did here, on the basis that relevant facts known to its board members were acquired outside the scope of their official duties and were known to them “personally” rather than “professionally.” Diaz v. Washington State Migrant Council, 265 P.3d 956, 968.

W.Va.

W.Va.2010. Quot. in ftn. Customer filed a putative class action in federal court against tax-preparation business that forwarded to lender her application for a loan based on her anticipated income-tax refund, alleging that the loan carried an exorbitant interest rate and was financially unsound, and that defendant received secret payments and concealed profits from lender for arranging the loan. The district court denied summary judgment for defendant on plaintiff's claim that it breached its fiduciary duty to her arising out of an agency relationship, and certified questions to this court for review, including the question of whether contractual agency disclaimers in the refund anticipation loan application were enforceable under West Virginia law. This court remanded, holding that, whether a relationship was characterized as agency in an agreement between parties was not necessarily controlling, and that the nature of the parties' relationship in this case had to be examined in a comprehensive factual analysis in order to determine whether defendant's agency disclaimer was enforceable. Harper v. Jackson Hewitt, Inc., 227 W.Va. 142, 706 S.E.2d 63, 77.

Wis.

Wis.2011. Com. (c) quot. in conc. op. and cit. in ftn. to conc. op., Rptr's Note cit. in ftn. to conc. op. Automobile purchaser filed a class-action lawsuit against Japanese manufacturer and its American subsidiary, alleging violations of state antitrust and conspiracy laws. The trial court granted defendants' motion to dismiss for lack of personal jurisdiction; the court of appeals affirmed. Affirming, this court held that even assuming subsidiary was the agent of manufacturer, absent control by manufacturer sufficient to disregard the entities' separate corporate identities, the activities of subsidiary were insufficient to subject its parent corporation to general personal jurisdiction. The concurrence opined that the majority opinion was potentially
confusing, because it referenced principles applicable to substantive analyses without making a distinction in applying those principles to the jurisdictional analysis; the concurrence explained that evidence of a parent corporation's significant control over the forum contacts of the subsidiary, not the indeterminacy of labeling a subsidiary an agent of the parent corporation, determined whether or not to impute the subsidiary's forum contacts to the parent corporation. Rasmussen v. General Motors Corp., 2011 WI 52, 335 Wis.2d 1, 803 N.W.2d 623, 644, 645.

Wyo.

Wyo.2011. Cit. in sup. Wyoming dealer of recreational vehicles petitioned for judicial review of the state board of equalization's decision that sales by dealer to out-of-state buyers were subject to Wyoming sales tax. The trial court affirmed the board's decision. Affirming, this court held that transfer of possession and title of vehicles that were sold to out-of-state buyers occurred in Wyoming, rather than in the buyers' home states. The court rejected dealer's argument that out-of-state buyers who picked up their vehicles were acting as their own agent and only had constructive possession for delivery purposes, reasoning that a person could not act as his or her own agent; under established agency law, an agency relationship was established when two parties agreed that one, the agent, would act on behalf of and subject to the control of the other, the principal. Maverick Motorsports Group, LLC v. Department of Revenue, 2011 WY 76, 253 P.3d 125, 133.